

**Orders of Reasons:  
Making Sense of Obedience and  
Disobedience to the Law**

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## **Declaration**

This thesis was composed by me. It is my own work and it has not been submitted for any other degree or professional qualification.

## Abstract

The thesis studies certain forms of obedience and disobedience to the law. It looks at compliance that results from a belief in the law's authority, then the behaviour of people who obey and disobey legal obligations for moral reasons and, finally, the phenomenon of civil disobedience. I examine these particular responses to the law because of the way in which they are normally understood. The leading theories of them are justified with reference to moral norms. I argue, however, that a philosopher can make sense of these practices without subjecting them to 'moralistic' analysis and suggest 'pure' alternatives to the dominant accounts. By doing so, I not only strive to improve comprehension of these instances of obedience and disobedience, but also seek to demonstrate the superiority of the philosophical approach on which my alternative interpretations of them are based. My claims in this thesis, then, are both substantive and methodological: I describe various responses to the law as well as a means of understanding them.

## Acknowledgements

In his essay 'Paradoxes of Conviction', G.A. Cohen admits that some of his philosophical beliefs result from his decision in 1961 to study at the University of Oxford.<sup>1</sup> He worries that his recognition of their dependence on causes other than reasons entails their irrationality. I dismiss his concern in chapter one of this thesis. Here, though, I wish to emulate the reflection that prompts his anxiety and identify certain people on whose influence – as far as I can tell – the present work depends.

I cannot begin to measure the impact on it of its supervisors, Professors Zenon Bankowski and Emiliós Christodoulidis. They have taught me much about the way in which humans relate to norms of different kinds or – in the words of my title – to 'orders of reasons'. My intellectual debt to them is considerable. I also owe them a great deal for their support throughout the years that I have taken to formulate the arguments that I now present.

During my time as a postgraduate student in Edinburgh, I was fortunate to spend many hours talking about legal philosophy (and less serious matters)

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<sup>1</sup> See G.A. Cohen 'Paradoxes of Conviction' in *If You're an Egalitarian, How Come You're So Rich?* (Cambridge, Mass.: Harvard University Press, 2000) 16-19.

## Acknowledgements

with Fernando Atria and Claudio Michelon. I have fond memories of our conversations and recognise their significant effect on the development of my ideas. I remember instructive discussions with other members of the 'reading group' too, particularly Emmanuel Melissaris, Leonor Moral Soriano and George Pavlakos. The financial assistance that I received from the Morna MacLeod Scholarship during this period enabled me to take part in these debates. I am thankful for such help.

Subsequently, I have benefited from dialogue with colleagues at the Universities of Aberdeen and Sydney as well as participants in various seminars and conferences at which I put forward earlier versions of some arguments. Parts of chapter three are derived from material that I presented at the 20<sup>th</sup> World Congress of the International Association for Philosophy of Law and Social Philosophy at the Vrije Universiteit in Amsterdam on 19 to 24 June 2001 and at the Annual Conference of the Australian Society of Legal Philosophy at the University of Melbourne on 13 to 15 December 2004. The second section of chapter four was developed following discussions with the University of Brighton Philosophy Society on 25 May 2000 and the University of Aberdeen Philosophy Society on 21 November of the same year. I received helpful comments on my account of civil disobedience – see chapter five – from

## Acknowledgements

participants in a seminar at the Centre for Law and Society at the University of Edinburgh on 3 May 2001 and my understanding of 'political obligation' – see the first section of chapter four – was improved by criticisms of a paper that I delivered at the most recent Annual Conference of the Australian Society for Legal Philosophy at the Australian National University in Canberra on 30 March to 1 April 2007. I thank everyone with whom I have discussed my ideas on these and other occasions.

I am also grateful to my friends and family – especially my parents, Morag and David – for their constant encouragement over the years. Their support has been remarkable and my debt to them is substantial. But the person to whom I owe most is Phil. Without her, this thesis would remain incomplete – and so would I.

# Introduction

Following the bombings on the public-transport system in London in July 2005,

Thomas L. Friedman wrote:

After every major terrorist incident, the excuse makers come out to tell us why imperialism, Zionism, colonialism or Iraq explains why the terrorists acted. These excuse makers are just one notch less despicable than the terrorists [...].<sup>1</sup>

This sort of opinion is common. People often denounce attempts to make sense of immoral conduct.<sup>2</sup> In doing so, they assume a connection between understanding and morality. They suppose that comprehension of human action involves moral evaluation of it. But is their assumption warranted? Can one explain behaviour *without* reference to moral norms?

I provide an answer in the first chapter of this thesis. My topic is the means by which a philosopher might describe a practice. I deny that he or she must engage in 'moralistic' interpretation. Even if comprehension is necessary to terrorists!

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<sup>1</sup> T.L. Friedman 'Giving the Hatemongers No Place to Hide' *The New York Times* 22 July 2005. Compare D. Clark 'To explain is not to excuse' *The Guardian* 21 September 2001.

<sup>2</sup> Recall, for instance, the controversy over the publication of Gitta Sereny's book on Mary Bell, who was convicted at the age of eleven of the manslaughter of two boys. See G. Sereny *Cries Unheard: The Story of Mary Bell* (London: Macmillan, 1998).

for moral evaluation of conduct,<sup>3</sup> I dismiss the converse proposition by insisting on the possibility of a 'pure' methodology in which morality does not feature.

My argument against the need for moralistic analysis starts with an exploration of the perspectives that a philosopher might adopt to detect and to make sense of different practices. I examine the 'internal' and 'external' points of view from which H.L.A. Hart says that deliberate conduct might be observed and elaborate on the attitude of 'acceptance' that characterises the former. Acceptance, I submit, is the belief that a particular set of norms includes the decisive reason for an action. It means participation – which need not be permanent – in one practice as opposed to another.

I then introduce three distinct ways of understanding such participation. I specify these modes of comprehension by looking at – without contributing to – the exegetical debate about the methodology that Hart employs in support of his theory of law. Having stated these techniques, I dismiss one of them – which I entitle 'philosophy as lexicography' – and assert the need for a philosopher to *interpret* the language (and thus the convictions) of the participants in any practice that he or she wishes to describe.

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<sup>3</sup> For a notorious suggestion to the contrary, see John Major's interview on 21 February 1993 with the *Mail on Sunday*. When asked about juvenile crime, the then-premier declared a need for society 'to condemn a little more and understand a little less.'



Both of the remaining methods are interpretive. They require evaluation – as opposed to mere narration – of everyday speech. According to many philosophers, the appraisal on which interpretation depends must be moral. Ronald Dworkin belongs to (and is a prominent member of) this group. A theory of a practice, he says, must explain ‘why a practice of that general shape is worth pursuing, if it is.’<sup>4</sup> He regards the imposition of a moral purpose on conduct as essential for comprehension of it.

I reject his belief in the necessity of moralistic analysis, however, by arguing for the possibility of the third methodology that commentators attribute to Hart. Moral criteria are absent from this kind of interpretation. Instead, a pure theorist evaluates behaviour with exclusive reference to ‘meta-theoretical’ norms. To establish the feasibility of this approach, I advance my own version of it – which comprises four non-moral ideals – before refuting arguments for the inevitability of its moralistic rival.

I thus defend the possibility of pure interpretation. But I do not claim that this methodology is necessary. Indeed, I do not even try to justify my faith in its superiority. Since every attempt to do so must rely on the very norms of which this mode of understanding consists, I can only demonstrate its relative worth

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<sup>4</sup> See R. Dworkin *Law's Empire* (London: Fontana, 1986) 66. See also R. Dworkin *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006) 15.



by implementing – rather than arguing for – it. In this thesis, I apply it to certain forms of obedience and disobedience to the law. The dominant theories of these practices are moralistic. I offer pure alternatives to them not only in an effort to improve comprehension of the behaviour that they describe, but also with the objective of revealing the inferiority of the methodology on which they are based.

The first response to the law that I examine – in chapter two – is the obedience of people for whom legal rules have authority. I compare my pure analysis of their conduct to the moralistic account that Joseph Raz articulates. He defines authority in relation to its legitimacy. His ‘service’ conception provides a moral explanation – via the ‘dependence’ and ‘normal-justification’ theses – for the peremptoriness that he considers the distinguishing feature of authoritative norms. He seeks to capture this quality in the ‘pre-emption’ thesis, which states that the directives of a legitimate authority prohibit action – although not reflection – on some of the reasons from which they ought to be derived.

By placing moral constraints on the exclusionary force of authoritative rules, however, Raz flouts two of the meta-theoretical values to which I express my commitment in chapter one. Because the conditions of legitimacy on which

he insists are neither precise nor compatible with the ordinary meaning of peremptoriness, his moralistic conception of authority lacks both clarity and comprehensiveness. I strive to remedy these defects with my pure alternative, which defines authority in terms of the theory of acceptance that I present in the first chapter. Legal norms are authoritative, on my account, whenever – which, admittedly, may not be often – they include the decisive reason for action. A person for whom they have this status complies with the law for its own sake and not for a reason of any other kind. Hence, he or she treats a legal obligation that is the product of deliberate enactment as an order (or command) due to his or her acceptance of the order (or class) of norms to which it belongs.

My attention then shifts to moral justifications for obedience and disobedience to the law. These reasons are of two sorts: each of them is either dependent on or independent of the substance of a legal obligation. The existence of a reason of the former type is contingent on moral appraisal of the behaviour that the law requires. In chapter three, I analyse the criteria – of which most are principles of justice – that pertain to this assessment.

My understanding of these norms is determined by the general theory of morality to which I subscribe. Many philosophers – among whom utilitarians are prominent – endorse an account of moral practice called ‘value-monism’.

They hold that one or a restricted set of the ideals in which participants believe is the source of the rest. These philosophers – to play yet again with words – order (or arrange) this order (or set) of principles so that moral dilemmas are merely apparent. They pronounce the compatibility of every moral ideal.

For Isaiah Berlin, however, clashes between moral values are often real. He ascribes their authenticity (and the loss that follows inexorably from them) to the intrinsic worth (and thus the incommensurability) of the ideals involved. He regards many – whereas value-monists regard only one or a few – of the values of which moral actors speak as ends-in-themselves. With exclusive reference to meta-theoretical norms, I defend the 'value-pluralism' that he advocates and thereby refute Dworkin's allegation that his repudiation of moral unity lacks philosophical support.

Although Berlin's methodology is not obvious, Dworkin is wrong to suppose that he must practise moralistic interpretation. By demanding a moral explanation for the meaning of every value and dismissing value-pluralism for failing to meet this condition (or, more accurately, a modified version of it), Dworkin ignores the potential of non-moral norms to justify value-pluralism. To compensate for his neglect, I ask whether a pure theorist ought to favour Berlin's conception of morality and conclude that he or she could only deny the

existence of moral dilemmas by exaggerating the importance of coherence and discounting the requirement for a theory to fit with the actual experiences of moral agents.

In *Black Dogs* by Ian McEwan, Bernard – in conversation with Jeremy, his son-in-law and would-be author of a memoir about Bernard and his deceased wife, June – rails against the inflated concern for unity and the concomitant distortion of practice on which – according to a pure theorist – value-monism seems to depend:

Bernard had a sudden change of mind. He swung round to me. 'By God, you're so keen to know,' he cried. 'I'll tell you this. My wife might have been interested in poetic truth, or spiritual truth, or her own private truth, but she didn't give a damn for *truth*, for the facts, for the kind of truth that two people could recognise independently of each other. She made patterns, she invented myths. Then she made the facts fit them. For God's sake, forget about sex. Here's your subject – how people like June bend the facts to fit their ideas instead of the other way round. Why do people do that? Why do they go on doing it?'<sup>5</sup>

If value-pluralism results from the proper application of the meta-theoretical norms of coherence and comprehensiveness to moral practice, however, then the role of a pure theorist in philosophical discussions of morality is inevitably limited. Bernard Williams is aware of this consequence. It makes him rather glum:

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<sup>5</sup> I. McEwan *Black Dogs* (London: Vintage, 1998) 86.

There is a problem with [pluralism and distrust of system in morality]: how does one carry on the subject – the subject, that is to say, of philosophy? I had a conversation recently with Michael Stocker, an American philosopher of similar temper. We were in the bar of a melancholy modern hotel in a melancholy run-down city in upstate New York. After one glass of bourbon, we agreed that our work consisted largely of reminding moral philosophers of truths about human life which are very well known to virtually all adult human beings except moral philosophers. After further glasses of bourbon, we agreed that it was less than clear that this was the most useful way to spend one's life, as a kind of flying mission to a small group isolated from humanity in the intellectual Himalaya.<sup>6</sup>

Notwithstanding Williams's alcohol-induced gloom, I maintain that value-pluralism – as the conception of morality with which a pure theorist ought to agree – makes most sense of the ideals that moral actors cite as content-dependent reasons to obey and disobey the law. Yet a predictable objection to this account of morality – and, therefore, to my claim that one should rely on it when evaluating the substance of the law – states that it is unable to work out the dilemmas to which it gives rise. Although I accept that it cannot solve genuine – as distinct from merely apparent – conflicts between moral ideals, I

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<sup>6</sup> B. Williams 'The Liberalism of Fear' in *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Selected, edited, and with an introduction by Geoffrey Hawthorn) (Princeton: Princeton University Press, 2005) 52. On the ignorance of moral philosophers, see also J. Gray *Straw Dogs: Thoughts on Humans and Other Animals* (London: Granta Books, 2003) 103: 'George Bernard Shaw wrote somewhere that a well-bred Englishman knows nothing of the world – except the difference between right and wrong. The same could be said of pretty well all moral philosophers. Like the well-bred Englishmen of whom Shaw wrote, they think their ignorance is a virtue.'

deny that its inability to settle these clashes is problematic. Only if the answers to moral questions must be entirely theoretical is value-pluralism undermined by its failure to indicate a method for the application of contradictory principles. I dismiss this need, however, and present a way of dealing with moral dilemmas that is simply consistent with – as opposed to specified by – value-pluralism. I submit that moral actors might – and, indeed, must – discriminate between incompatible norms by exercising *judgment*, which involves examination of – to borrow Charles Larmore’s expression – ‘the particularity of a given situation.’<sup>7</sup> In doing so, I acknowledge the limited relevance of philosophical reflection to moral decision-making. Hence, my thesis considers the place of philosophy in morality as well as the role of morality in philosophy.

Moral justifications for obedience and disobedience to the law of the other – that is, content-independent – sort are my subject in chapter four. Such reasons are contingent on moral appraisal of something besides the conduct that the law requires. They are derived from principles of *legitimacy* – rather than justice – which, I suggest, generate two kinds of content-independent reasons to comply with legal obligations. These principles warrant obedience to the law on account of either the mere fact of its existence or the process from which it

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<sup>7</sup> C. Larmore *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987) 20.

results. From the perspective of a pure theorist whose understanding of morality is pluralistic, I look at both. Contrary to philosophical consensus, I classify a reason of the former type as a 'political obligation'. I claim that my 'thin' conception of this duty better satisfies the quartet of meta-theoretical norms to which I am committed than 'thicker' alternatives. My contemplation of the procedural explanation that moral agents often provide for their obedience to the law is more concrete, however. I do not engage in conceptual analysis of this second kind of content-independent reason. Instead, I consider the justifiability of the common belief that the supposedly 'democratic' source of a legal obligation furnishes moral actors with a reason to act lawfully.

The final response to the law of which I offer a pure interpretation – in the last chapter – is civil disobedience. My discussion focuses on the influential theory of John Rawls. For him, civil disobedience is 'a public, non-violent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.'<sup>8</sup> At the core of his definition – as he readily admits – is a moralistic conception of political behaviour that supposes agreement between democratic citizens on the principles of which his liberalism consists. By portraying civil disobedience as a

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<sup>8</sup> J. Rawls *A Theory of Justice* (Revised edition) (Oxford: Oxford University Press, 1999) 320. See also J. Rawls 'The Justification of Civil Disobedience' in *Collected Papers* (Edited by S. Freeman) (Cambridge, Mass.: Harvard University Press, 1999) 181.



## Introduction

means of correcting deviations from these shared ideals, however, Rawls not only neglects ordinary beliefs about this form of dissent and politics in general, but also confuses questions of meaning and morality on whose separation the meta-theoretical norm of clarity insists. I thus propose the excision of his liberal account of politics from the definition of civil disobedience and the insertion of my pure alternative, which originates – but is not wholly present – in the work of Carl Schmitt. With this substitution, I conclude my attempt to demonstrate the superiority of the philosophical approach to which I express my commitment in chapter one and on which I rely throughout the present work.



## **The Possibility of Pure Interpretation**

This thesis looks at some ways in which people respond to the law. It also studies the means by which a philosopher can make sense of these responses. Influential understandings of the specific practices that I scrutinise are justified with reference to moral norms. I reject such 'moralistic' theories and, instead, offer descriptions that are based on a 'pure' methodology in which moral evaluation has no place. My claims, then, are both substantive and methodological: I describe various responses to the law and a philosophical approach for making sense of them.

Before I can apply this alternative methodology (and thereby formulate these alternative understandings), I must establish that pure theory is at least possible. In the present chapter, therefore, I am concerned exclusively with methodological issues. I do not examine in detail any particular responses to the law, but merely the processes by which they might be understood. More precisely, I argue that a philosopher can describe these practices without subjecting them to moral evaluation.

My argument in this chapter has seven sections. I start by indicating the specific responses to the law with which I am concerned in subsequent chapters and explaining my interest in them. Then – in the second section – I consider the perspectives from which a philosopher can identify and make sense of these practices. I develop H.L.A. Hart's distinction between the 'internal' and 'external' points of view by analysing the phenomenon of taking part in a practice. The subsequent section introduces three different ways of theorising about such participation. I set forth these techniques by outlining the current disagreement between commentators as to the methodology employed by Hart in defence of his legal theory. I do not enter this debate, but simply use it to present three modes of comprehension.

I then look more closely at these methods. In section four, I dismiss theories of practices that do no more than report the beliefs of participants as articulated in their speech. I argue that interpretation (and not mere narration) of their convictions is necessary. A philosopher who interprets a practice seeks to identify the significant aspects of it and this task requires evaluation of the language of participants.

Many legal theorists justify such an assessment in moral terms. In the fifth section, I discuss moralistic interpretation by looking at their work. With

reference to Julie Dickson's recent analysis of jurisprudential method, I consider some attitudes of these philosophers towards moralistic interpretation before isolating the proposition whose denial is the purpose of the present chapter.

My refutation of this proposition has two stages. First – in the penultimate section of the chapter – I describe an alternative form of interpretation that eschews moral evaluation. In the absence of non-moral criteria for assessing a practice, moralistic interpretation would be necessary by default. In section seven, I conclude my case for the possibility of pure theory by rejecting arguments for the inevitability of moralistic interpretation. I also account for my refusal to make the stronger claim that pure interpretation is necessary as well as possible. I hold that neither the necessity nor even the superiority of a mode of interpretation – whether pure or moralistic – can be justified (although a philosopher's preference for interpretation of a specific kind might be explained by causes other than reasons). Consequently, the only means by which I can demonstrate the superiority of pure interpretation is by practising it. And I do so throughout this thesis. Indeed, I presuppose its viability and rely implicitly on it in the following sections.<sup>1</sup>

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<sup>1</sup> I respond in the final section of this chapter to the predictable criticism that such reliance makes my argument circular.

## I

One can respond to the law in numerous ways. One might, for instance, write a letter to a newspaper about a recent judicial decision, vote in an election against a government with a poor legislative record or express incredulity to friends upon learning that certain behaviour is illegal. The reactions with which I am concerned, however, are varieties of obedience and disobedience. In this section, I distinguish acts of obedience and disobedience from other responses to the law before introducing the specific practices that I examine in subsequent chapters.

A person obeys the law by complying with a legal rule and disobeys it by not doing so. But some legal rules with which compliance and non-compliance are possible cannot be obeyed or disobeyed. According to Hart, a legal system comprises both 'primary' and 'secondary' rules.<sup>2</sup> The former generate obligations by stipulating ways in which a person to whom they apply should (and should not) act and the latter allow for the management of these obligations. Secondary rules facilitate particular actions, including the formation of contracts, the creation of legislation and the adjudication of disputes.<sup>3</sup> Since the law does not regard compliance with secondary rules as compulsory – there

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<sup>2</sup> See H.L.A. Hart *The Concept of Law* (2<sup>nd</sup> edition) (Oxford: Clarendon Press, 1994), especially chapters three and five. I say more about these different sorts of rules in section three when discussing Stephen Perry's claim that Hart's theory of law is moralistic.

<sup>3</sup> Although the 'rule of recognition' is not power-conferring – see my discussion in section two – Hart nevertheless classifies it as secondary. I can ignore this rule here.

is, for instance, merely a legal *option* to contract with others – they can be neither obeyed nor disobeyed. Obedience or disobedience is a potential response only to a legal rule that demands the performance of certain behaviour and whose infringement is typically called a ‘crime’, ‘tort’ or ‘breach of contract’. Although secondary rules enable the introduction of (as well as the resolution of any subsequent disagreements about) duty-imposing norms, they cannot themselves be obeyed or disobeyed.<sup>4</sup>

Yet one might abide by or contravene a primary rule without obeying or disobeying it. Whereas conformity or nonconformity to a legal norm of this type need not be intentional – some crimes, for example, can be committed recklessly – obedience and disobedience are *deliberate* responses to legal demands. To obey or disobey a law, one must intend to comply with or violate a primary rule. Therefore, every act of obedience or disobedience to the law must satisfy three conditions.

First, the actor must have sufficient legal knowledge. Since a deliberate response to the law requires familiarity with it, an act of whose actual legal status the actor is unaware can be neither obedience nor disobedience. Such ignorance – whether caused by the falsity or the absence of a legal belief –

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<sup>4</sup> On the impossibility of obeying or disobeying secondary rules, see H.L.A. Hart *The Concept of Law* 31-32.

prevents intentional compliance with and contravention of the law. Hence, a tourist in Sydney to whom the legal prohibition on offensive language in a public place is unknown does not disobey the law by swearing outside the Opera House.<sup>5</sup> Only a primary rule of which one has knowledge – mere suspicion is not enough<sup>6</sup> – can be obeyed or disobeyed.

Even if correctly recognised by the actor as legal or illegal, the act must be performed for a reason. It must be planned (and not – as with reckless conduct – merely thought to be likely). Consequently, one neither obeys nor disobeys the law if one fails to attain the objective for which one acts. Suppose that a man tries to kill another man, but is prevented from doing so by the unexpected intervention of a third party.<sup>7</sup> As this man does not wish the other man to survive, he cannot be said to disobey the legal ban on attempted murder. Moreover, his desire for a fatal result precludes his obedience to the legal rule proscribing the completed offence. To qualify as obedience or disobedience, behaviour must effect a specified purpose.

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<sup>5</sup> The crime of using 'offensive language in or near, or within hearing from, a public place or a school' can be found in section 4A of the Summary Offences Act 1988 (NSW). Of course, the holiday-maker's ignorance of this rule provides no (legal) defence to a charge of breaching it.

<sup>6</sup> Compliance with or violation of a legal norm whose existence one regards as no more than probable is reckless, not deliberate.

<sup>7</sup> To avoid needless complexity, I assume that this intervention precedes an assault on the proposed victim (or the perpetration of any other crime).



Finally, the law must be a reason for or against the action. Adherence to or infringement of a primary rule that has no bearing on conduct is purely incidental. That I comply with the legal duty not to steal, for example, is no more than an anticipated side-effect of sitting at my computer and typing these words. My conformity to this legal norm, even if foreseen, is not deliberate. As Victor Tadros argues, a consequence cannot be intentional unless it comprises a reason for or against a particular activity.<sup>8</sup> Since the law of theft has no impact on whether I should write my thesis, I do not intentionally abide by it. In such circumstances, my compliance does not amount to obedience. However, if I grab \$10 from someone's pocket, then – provided I mean to take it and know that doing so is illegal – I intentionally defy the legal obligation not to steal. The law is a reason against taking the money. By appropriating it despite this reason, I disobey the law.

Fulfilment or violation of a legal duty is intentional, therefore, if done for a reason and in the knowledge that the law requires or prohibits the behaviour in question. According to Robert Paul Wolff, however, obedience involves more than deliberate compliance with a demand: 'Obedience is not a matter of doing what someone tells you to do. It is a matter of doing what he tells you to do

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<sup>8</sup> See V. Tadros 'Practical Reasoning and Intentional Action' 20 *Legal Studies* (2000) 104.

*because he tells you to do it.*<sup>9</sup> On this definition, obedience to the law is wilful adherence to a primary rule for its own sake (and not for, say, a moral reason). But Wolff's account is too narrow. By applying the label of obedience to deliberate compliance with a legal obligation only if motivated by the obligation itself, he distorts ordinary language. Other forms of intentional conformity to the law are normally classified as obedience. And the distinctiveness of the conduct that Wolff regards as obedience can be marked without such distortion by describing it as a particular species (rather than the sole type) of obedience.<sup>10</sup> Hence, I resist Wolff's further condition and maintain that obedience to the law is possible even if a primary rule is not the motive for action. I deny that a legal norm must be *the* reason for action when obeying the law: that it is *a* reason (of which the actor is aware) is sufficient.

To obey or disobey the law, then, one must act for a reason (of any sort) in the knowledge that there is a legal reason for or against doing so. But this does not mean that every instance of obedience or disobedience must be preceded by both legal analysis and practical deliberation. Rather, one might *habitually* obey or disobey certain primary rules. Having entered a valid

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<sup>9</sup> R.P. Wolff *In Defense of Anarchism* (Berkeley, California: University of California Press, 1998) 9. See also R.C.A. Higgins *The Moral Limits of Law: Obedience, Respect, and Legitimacy* (Oxford: Oxford University Press, 2004) 9.

<sup>10</sup> See chapter two.



contract, for example, one might simply copy one's previous obedience to legal norms generated by such agreements. Notwithstanding that one contemplates neither the legality of nor the motivation for one's response to this particular contract, one intentionally complies with (and thus obeys) the legal requirements arising from it. By imitating – whether directly or indirectly – conduct that *was* accompanied by an appreciation of these factors, one relies implicitly upon them. Before obeying or disobeying the law, therefore, one need not always be conscious of the decisive reason for and the legal reason for or against one's action. Of course, one who does not think about these reasons in advance might articulate them in a subsequent explanation.

Despite the existence of numerous forms of obedience and disobedience to the law, I look at only three ways of obeying or disobeying a legal rule in this thesis. I begin by studying obedience that results from a belief in the authority of law. I then inspect the practice of obeying and disobeying legal norms for moral reasons. Finally, I consider the phenomenon of civil disobedience.

Why do I restrict the scope of my inquiry in this manner? One might suppose that I examine these practices because I regard them as the most common forms of obedience and disobedience to the law. But I make no claims

about their prevalence.<sup>11</sup> I note merely that these particular responses to the law exist (and concede that they might be rare). So what accounts for my interest in them?

My concern is prompted by the way in which they are often understood. Influential descriptions of these practices are justified with reference to moral norms. Joseph Raz provides a moralistic reading of authority by insisting on the prior status of authority that is morally legitimate. I look at his theory in chapter two. Chapter three – from which chapter four develops – examines Ronald Dworkin's application of the same methodology to moral practice. He explains the values (or, more precisely, all but two of the values) of which morality consists in moral terms. In chapter five, I explore John Rawls's moralistic theory of civil disobedience. For Rawls, the meaning of civil disobedience depends on his liberal view of politics.

Yet are such theories necessary? In the present chapter, I deny the need for philosophers of these practices to engage in moral evaluation of them and I suggest an alternative method by which they might be understood. This method is, in my opinion, superior to the moralistic approach of Raz, Dworkin and Rawls. Hence, I study these responses to the law because prominent

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<sup>11</sup> For discussion of such sociological matters, see T.R. Tyler *Why People Obey the Law* (New Haven: Yale University, Press, 1990).

understandings of them rely on a methodology that I reject. Before articulating my rejection, however, I must consider the perspectives from which philosophers might detect and then describe these practices. I do so in the next section.

## II

Obedience and disobedience are intentional responses to legal demands. Hart distinguishes between two points of view from which one can look at deliberate conduct. He says that one might observe it from either the 'internal' or the 'external' perspective. In this section, I examine these points of view and ask whether a philosopher is able to identify and then describe an act of obedience or disobedience from both angles.

The inside view of a deliberate action is from the position of the actor. According to Hart, one adopts the internal perspective by sharing the 'critical reflective attitude'<sup>12</sup> of the person whose intentional behaviour one observes. This attitude involves 'acceptance' of particular rules as 'guides to conduct' and 'standards of criticism'.<sup>13</sup> To regard a deliberate action from the inside, one must

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<sup>12</sup> H.L.A. Hart *The Concept of Law* 57.

<sup>13</sup> See H.L.A. Hart *The Concept of Law* 89, 242, 255.

'accept' the same rules as the actor. Alas, Hart – perhaps due to uncertainty<sup>14</sup> – says little about the 'distinctive normative attitude'<sup>15</sup> that characterises the internal point of view. Apart from resisting its equivalence to moral endorsement,<sup>16</sup> he does not define it. I strive to remedy this absence with the following account of acceptance.

My description starts from the assumption that, of the (perhaps numerous) reasons for a deliberate action, the actor must regard one as decisive. This reason motivates the actor. Thus, any person who claims to have more than one 'explanatory' reason for doing something fails to make explicit the real purpose of the deed.<sup>17</sup> Take the case of a woman who accounts for what she does by citing every reason in its favour: if her behaviour is genuinely deliberate, then either she is lying – perhaps in an attempt to convince a sceptical audience that her action is correct – or she is motivated by a belief that the sum of the reasons for an action should exceed the aggregate of those against it. For every intentional action, then, the actor has an ultimate reason. Of course, the actor's reliance on this (as opposed to another) reason cannot be

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<sup>14</sup> See N. Lacey *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004) 223, 228, 335-336.

<sup>15</sup> H.L.A. Hart *The Concept of Law* 255.

<sup>16</sup> See H.L.A. Hart *The Concept of Law* 203, 257.

<sup>17</sup> On 'explanatory' reasons, see J. Raz *Practical Reason and Norms* (2<sup>nd</sup> edition) (Princeton: Princeton University Press, 1990) 16-20.

justified. Were the actor to contribute such a justification, it would deny the very primacy of the reason that it supports. As Ludwig Wittgenstein states: 'To be sure there is justification; but justification comes to an end.'<sup>18</sup> After the decisive reason – that is, at the end of justification – comes *acceptance*.

The actor accepts the set of rules to which the ultimate justification for the action belongs. Acceptance is the actor's belief that rules of a particular type include the decisive reason for the action. An individual who is moved to act by a legal reason, for example, takes this critical-reflective attitude to the rules of a legal system. By accepting certain rules as 'guides to conduct', the actor participates in a distinct practice. The identity of the practice in which the action is located depends on the nature of the actor's motive. Hence, a person whose ultimate reason for acting is moral participates in moral practice. Acceptance might also be described as the actor's engagement in a practical discourse. This discourse comprises rules, one of which is the ultimate reason for the action.

If internal scrutiny of a deliberate action requires acceptance of the same kind of rules as the actor, then an observer who adopts the internal perspective must agree with the nature of the actor's motive. Such observation entails participation in the same practice as the actor. An internal observer takes part in

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<sup>18</sup> L. Wittgenstein *On Certainty* (Edited by G.E.M. Anscombe & G.H. von Wright) (Translated by D. Paul & G.E.M. Anscombe) (Oxford: Blackwell, 1969) § 192.

this practice by evaluating the action in accordance with a rule of the type that motivates the actor. The 'standard of criticism' on which the internal observer's appraisal relies need not be identical to the rule by which the action is caused: that they belong to the same *order* is sufficient. Since the rule used by an internal observer might be distinct – albeit not in kind – from the rule that motivates the actor, an internal observer can either commend or condemn the action. In other words, fellow-participants in a specific practice might disagree about the action that ought to be performed in a particular situation.<sup>19</sup> Yet their dispute supposes agreement on the sort of rule by which the actor should be motivated. Insofar as such consensus is absent, internal observation is impossible.

The implications of this account of acceptance can be illustrated by considering its impact on Hart's theory of law. According to Hart, acceptance of the rules of a legal system entails acceptance of the 'rule of recognition' by which they are identified.<sup>20</sup> This rule 'provides criteria for the assessment of the validity of other rules; but [...] there is no rule providing criteria for the assessment of its own legal validity.'<sup>21</sup> It is the highest rule of a legal system. Acceptance of legal rules thus implies acceptance of the rule of recognition that validates them. Moreover, Hart insists on collective acceptance of this basic rule

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<sup>19</sup> I look more closely at such disagreement in section four of this chapter.

<sup>20</sup> On the 'rule of recognition', see H.L.A. Hart *The Concept of Law* 94-110.

<sup>21</sup> H.L.A. Hart *The Concept of Law* 107.



by legal officials. He believes that legal rules cannot exist unless officials (such as judges) accept them.<sup>22</sup> For Hart, the existence of a legal system is contingent on 'a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity.'<sup>23</sup> Whether citizens also have this critical-reflective attitude is beside the point so long as the duty-imposing rules of the system are 'generally obeyed' by them.<sup>24</sup> Significantly, Hart denies that official acceptance of the rule of recognition must result from a moral obligation:

Not only may vast numbers be coerced by laws which they do not regard as morally binding, but it is not even true that those who do accept the system voluntarily must conceive of themselves as morally bound to do so, though the system will be most stable when they do so. In fact, their allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do.<sup>25</sup>

Contrary to, say, Richard Holton – for whom acceptance is apparently an entirely moral attitude<sup>26</sup> – Hart thinks that one might accept a rule of recognition (and the rules whose legality it certifies) for a non-moral reason. On my

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<sup>22</sup> If official status is created by (and so presupposes) a legal system, then Hart's proviso is illogical: see D.N. MacCormick *H.L.A. Hart* (London: Edward Arnold, 1981) 109.

<sup>23</sup> H.L.A. Hart *The Concept of Law* 115.

<sup>24</sup> See H.L.A. Hart *The Concept of Law* 116. Of course, I need not (and, in fact, do not) accept the requirements for the existence of a legal system that Hart specifies. For a critical appraisal of these conditions, see B.Z. Tamanaha *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001) 143-148, 152-155.

<sup>25</sup> H.L.A. Hart *The Concept of Law* 203. See also 257.

<sup>26</sup> See R. Holton 'Positivism and the Internal Point of View' 17 *Law and Philosophy* (1998) 597, at 600-606.

definition, however, acceptance of legal rules can *never* be justified. Since one accepts the scheme of rules to which the decisive reason for one's action belongs, then one cannot have a reason – whether moral or otherwise – for accepting a rule of recognition. One accepts legal rules if they include the ultimate justification for one's action. By giving a reason for this acceptance, one simply denies that a legal rule provides – in Scott Shapiro's words – 'motivational guidance'.<sup>27</sup> Indeed, one whose fidelity to a legal system depends on a further reason accepts *non-legal* rules. Hence, officials negate their acceptance of legal rules by providing a reason for it.

Although Hart says that a legal system cannot exist without official acceptance of the rule of recognition, he does not believe that officials must *always* accept legal rules. He requires only that their *professional* conduct is motivated by the law and acknowledges that they might accept non-legal rules when acting in a personal capacity.<sup>28</sup> I conclude my examination of acceptance with, first, a defence of the possibility of engagement in different practical discourses at assorted times and, second, a brief discussion of potential explanations for participation in a specific practice at an identifiable moment.

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<sup>27</sup> See S. Shapiro 'On Hart's Way Out' in J. Coleman (ed.) *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford: Oxford University Press, 2001) 173.

<sup>28</sup> See H.L.A. Hart *The Concept of Law* 117.



Those for whom intentional behaviour is of a single type deny that an actor might accept rules of various kinds over time. A popular (but not the only) version of this objection maintains that every deliberate action is moral.<sup>29</sup> Yet such a claim is ambiguous. I suggest three potential readings of it, none of which succeeds in denying that a person can participate in many practices on diverse occasions.

The statement that every deliberate action is moral might mean that intentional behaviour can always be morally assessed. This first interpretation is harmless. Although any wilful act can be evaluated with reference to moral norms, numerous other types of appraisal are possible too. According to the logic of this first interpretation, then, every deliberate action is also legal and prudential and so on. Moreover, moral evaluation of an intentional act is possible even if the actor's motive is non-moral. A critic of a deliberate action need not accept the same set of rules as the actor. By failing to require constant acceptance of moral norms, this first reading is entirely compatible with individual participation in a range of practices over time.

Alternatively, perhaps every deliberate action is moral simply because every reason for action is moral. This interpretation denies that a person can

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<sup>29</sup> Other prominent (and similarly problematic) forms of this denial include the assertion that economic rationality is all-encompassing and the slogan that 'everything is politics'.

engage in a number of practical discourses throughout life by asserting that there is no practice other than morality. But a description of moral practice that extends to all intentional acts (including, say, those of cruelty) is obviously flawed. Whatever philosophical method one employs, such an expansive account of morality is untenable.<sup>30</sup>

In fact, that any – never mind every – person takes part only in moral practice is improbable.<sup>31</sup> Even if one recognises the limits of morality and concedes that at least some people act for non-moral reasons on at least some occasions, no individual's participation in moral practice is likely to be constant. Imagine a man who accepts only moral norms. He is a 'moral saint'.<sup>32</sup> All of his intentional conduct – however mundane – is motivated by morality. In circumstances where moral rules do not require a specific action, his behaviour is arbitrary. Since he never treats a non-moral reason as decisive, none of his actions is inspired by, say, his own self-interest or his love for another person. Indeed, he never eats a particular meal just because it is tasty, plays a game with the sole aim of having fun or visits a place for its beauty alone. He is so unlikely

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<sup>30</sup> For a similar point, see P. Singer 'Why Act Morally?' in *Practical Ethics* (2<sup>nd</sup> edition) (Cambridge: Cambridge University Press, 1993) 315-316.

<sup>31</sup> On the limited extent to which people act morally, see J. Gray *Straw Dogs: Thoughts on Humans and Other Animals* (London: Granta, 2003) 88.

<sup>32</sup> See S. Wolf 'Moral Saints' 79 *Journal of Philosophy* (1982) 419.

that some people might even refrain from calling him 'human'.<sup>33</sup> His pathological moralism contrasts with the changing motivations of a normal individual. Whereas he depends exclusively on moral rules, a 'human' shifts between various practices. As George Orwell notes, 'sainthood is [...] a thing that human beings must avoid.'<sup>34</sup>

Finally, someone for whom every deliberate action is moral might believe that *reason* necessitates exclusive reliance on morality. According to this person, acceptance of non-moral rules is not rationally possible. But any attempt to justify participation in moral practice is either circular or contradictory. Such participation is presupposed if one cites a moral reason for it and refuted if the justification that one provides is non-moral. Since logic thus precludes any rational objection to amoralism – whether partial or complete – this third reading also fails to establish the impossibility of engaging in a variety of practical discourses at different times.

Hence, a person can switch between orders of reasons. Although acceptance – whether temporary or permanent – of one (as opposed to another)

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<sup>33</sup> Of course, consistent amoralism is no more likely (and thus no more 'human') than constant participation in moral practice. See, for example, B. Williams 'The Amoralist' in *Morality* (Canto edition) (Cambridge: Cambridge University Press, 1993).

<sup>34</sup> G. Orwell 'Reflections on Gandhi' in *Shooting an Elephant and Other Essays* (London: Penguin, 2003) 353. A 'human' can nevertheless learn much about morality from observing a saint: see R. Gaita 'Goodness beyond Virtue' in *A Common Humanity: Thinking About Love and Truth and Justice* (London: Routledge, 2000).

set of rules cannot be justified, it might be explained by causes other than reasons. These causes are of three types.<sup>35</sup>

First, one might participate in a specific practice because of one's *character*. Suppose a woman's bravery causes her to act for a moral reason. Her courage does not justify her participation in moral practice: to say that one should do something because one is brave makes no sense.<sup>36</sup> Rather, her bravery is a trait of character that prompts her acceptance of moral norms.

Second, the *power of another person or other people* might cause one to take part in a certain practice. This capacity takes a number of possible forms. Acceptance of legal norms might be brought about by a charismatic lawyer, for instance.<sup>37</sup> 'At the end of reasons', says Wittgenstein, 'comes *persuasion*.'<sup>38</sup>

Third, one might engage in a specific practical discourse as a result of exercising *judgment*. This involves choosing between orders of reasons in a given context. It is about deciding which of them provides the ultimate justification for

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<sup>35</sup> Although these sorts of causes are not mutually exclusive, I say nothing here on the difficult topic of their interaction.

<sup>36</sup> See B. Williams *Ethics and the Limits of Philosophy* (London: Fontana, 1985) 10. Of course, a person might be motivated by a (non-moral) desire to *appear* brave. But this is quite different from citing actual bravery as the reason for an action.

<sup>37</sup> By assuming the existence of such a person, this example no doubt contradicts conventional wisdom.

<sup>38</sup> L. Wittgenstein *On Certainty* § 612.

action in a particular situation. I look more closely at this final option in chapter three.

Incidentally, each of these causes can also explain the *way* in which (and not merely the fact that) someone takes part in a certain practice. A rational explanation for a distinct mode of participation is impossible: any attempted justification is either an act within that practice (and, therefore, an aspect of the explanandum) or a contribution to another practice (and so inconsistent with the conduct for which a reason is sought). Individual temperament, the power of another person or other people and the use of judgment, however, can explain different styles of participation. Take moral practice, for example. One man's sensitivity to the suffering of his fellow humans might generate his compassionate behaviour towards them, whereas another man's desire for freedom might be due to the attitudes expressed by his parents during his youth. A third man might wish to increase equality as a result of exercising judgment.

Yet a person with knowledge of these causes might be accused of irrationality. G.A. Cohen contemplates an objection of this sort.<sup>39</sup> He examines – but neither accepts nor rejects – the claim that a belief is irrational insofar as its

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<sup>39</sup> See G.A. Cohen 'Paradoxes of Conviction' in *If You're an Egalitarian, How Come You're So Rich?* (Cambridge, Mass.: Harvard University Press, 2000).



holder is aware of its dependence on causes other than reasons.<sup>40</sup> The success of this charge would, he says, generate the paradox that 'people are starkly irrational in contexts where we do not normally account them irrational.'<sup>41</sup> In particular, Cohen asks whether a person is irrational to the extent that he or she holds a belief in the knowledge that it results from his or her upbringing and thus lacks rational support.

The conclusion that a person is irrational in such circumstances is, however, a non sequitur. The irrationality of a belief does not follow from learning that it is a consequence of upbringing or any similar fact. No more than the *non-rationality* of a belief is entailed by the absence of a justification for it. To be irrational, a belief must be *contrary to* (and not merely unsupported by) reason. But rational criticism of both the fact and the mode of acceptance of a particular order of reasons is impossible. As prior to reason, these beliefs cannot be the subject of rational assessment. Given that recognition of their dependence on causes other than reasons implies only their non-rationality and that no reason can be offered against them, their irrationality (and the paradox that Cohen describes) cannot be established.

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<sup>40</sup> Note that this allegation implies the irrationality of every judge for whom a 'legal-realist' account of the causes of judicial decisions is convincing. On the attributes of legal realism, see B. Leiter *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007) chapter one.

<sup>41</sup> G.A. Cohen 'Paradoxes of Conviction' 13.



My account of acceptance, then, supposes that a deliberate action must have an ultimate justification. The actor accepts the set of rules to which this decisive reason belongs. Yet I do not suppose that one must always accept rules of the same kind. My account recognises that one can engage in various practical discourses on different occasions. Moreover, it identifies three possible explanations for participation in a specific practice at a specific time (and in a specific manner): individual temperament, the power of another person or other people and the use of judgment. In this way, therefore, I define the critical-reflective attitude that characterises the inside view of a deliberate action.

But what about the external perspective? Whereas an internal observer of a wilful act participates in the same practice as the actor, an external observer does not agree with the nature of the actor's motive. Hart distinguishes between two kinds of external observation: he separates an external observer who is aware of the critical-reflective attitude of the actor from an external observer to whom the actor's beliefs are invisible.<sup>42</sup> Neil MacCormick labels the former point of view 'hermeneutic'.<sup>43</sup> In adopting this version of the external perspective, one shares the 'cognitive' (but not the 'volitional') element of rule-acceptance.<sup>44</sup>

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<sup>42</sup> See H.L.A. Hart *The Concept of Law* 89.

<sup>43</sup> See D.N. MacCormick *H.L.A. Hart* 29-44.

<sup>44</sup> See D.N. MacCormick *H.L.A. Hart* 38. See also D.N. MacCormick *Legal Reasoning and Legal Theory* (2<sup>nd</sup> edition) (Oxford: Clarendon Press, 1994) 292.

While not (currently) a participant in the same practice as the actor, such an observer is familiar with it. From the hermeneutic point of view, one appreciates the rules that the actor accepts. This knowledge enables one to make normative statements and thus simulate participation.<sup>45</sup> In refining Hart's description of the hermeneutic perspective, MacCormick says:

[I]t is simply not true that all statements of 'ought', 'must', 'should', 'right', 'wrong', 'obligation', 'liability' or whatever, do presuppose an assumption *on the speaker's part* of the internal point of view or of committed acceptance of rules or other standards. Such statements do certainly presuppose some rule or standard to which reference is made. But it need not be a standard which the speaker accepts or adheres to from the internal point of view. [...] Any such normative statement may be made *either* from the internal point of view *or* from the hermeneutic point of view, and the mere act of making such a statement is entirely ambiguous in its presuppositions as between the two.<sup>46</sup>

From the hermeneutic perspective, then, one can identify legal duties without participating in a legal practice. One's perception of these obligations is consistent with one's acceptance of non-legal rules. According to Shapiro, a legal rule of which one is merely aware can supply 'epistemic guidance'.<sup>47</sup> One is epistemically guided by a legal rule that is not the ultimate reason for action and with which one complies for a non-legal reason. Whereas one who is

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<sup>45</sup> On simulated participation by an external observer, see M.H. Kramer *In Defense of Legal Positivism: Law without Trimmings* (Oxford: Oxford University Press, 1999) 165-166.

<sup>46</sup> D.N. MacCormick *H.L.A. Hart* 39.

<sup>47</sup> See S. Shapiro 'On Hart's Way Out' 173-174.

*motivationally* guided by a legal rule participates in a legal practice, one whose obedience is *epistemically* guided observes this practice from the hermeneutic point of view. When Hart says that citizens might 'acquiesce in' – that is, be epistemically (rather than motivationally) guided by – legal rules,<sup>48</sup> he supposes that they need only take the hermeneutic perspective to a legal practice. Even if their knowledge of this practice is not complete,<sup>49</sup> Hart assumes that it is sufficient for them to obey the law in most circumstances. Hence, for Hart, a legal system cannot exist unless citizens at least observe official acceptance of the rule of recognition from the hermeneutic point of view.<sup>50</sup>

One who adopts the alternative version of the external perspective, though, is completely blind to the rule-acceptance of others. As Hart states:

Such an observer is content merely to record the regularities of observable behaviour in which conformity with the rules partly consists and those further regularities, in the form of hostile reaction, reproofs, or punishments, with which deviations from the rules are met. After a time the external observer may, on the basis of the regularities observed, correlate deviations with hostile reaction, and be able to predict with a fair measure of success, and to assess the chances that a deviation from the group's normal behaviour will meet with hostile reaction or punishment. [...] If, however, the observer really keeps austerely to this extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view

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<sup>48</sup> See H.L.A. Hart *The Concept of Law* 117.

<sup>49</sup> See H.L.A. Hart *The Concept of Law* 114.

<sup>50</sup> Note that my analysis here is consistent with rejection of this condition for the existence of a legal system.

their own regular behaviour, his description of their life cannot be in terms of the rule-dependent notions of obligation or duty.<sup>51</sup>

In short, this uncompromising form of external observation allows one to witness physical movement and speech, but nothing else.

Can a philosopher detect and then describe an act of obedience or disobedience from both the internal and external points of view? Certainly, observation from the extreme-external perspective precludes identification of such an act. An observer who adopts this radical viewpoint cannot tell in which practice intentional behaviour is situated. In fact, this observer is not even able to see that it is intentional. To identify an act of deliberate compliance or non-compliance with a legal duty, then, a philosopher must adopt a perspective from which the critical-reflective attitude of the actor is at least evident. Both the internal and the hermeneutic points of view satisfy this condition. Detection of an act of obedience or disobedience requires a philosopher to either share or appreciate the actor's acceptance of certain rules.

Although necessary, internal or hermeneutic observation of the practice in which the actor participates might not be sufficient for one to identify an act of obedience or disobedience. Since one must recognise the actor's conformity to or violation of a legal duty, one has to adopt either the internal or the

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<sup>51</sup> H.L.A. Hart *The Concept of Law* 89.

hermeneutic perspective to a legal practice. If the actor is motivationally guided by a rule of law, one observes a legal practice simply by looking at the practice in which the actor participates. One can thus detect this response by considering a single practice from either the internal or the hermeneutic point of view. If a legal rule provides mere epistemic guidance to the actor, however, one must scrutinise two different practices. Detection of such obedience requires internal or hermeneutic observation of a legal practice and – depending on the perspective from which this legal practice is observed<sup>52</sup> – internal or hermeneutic observation of the non-legal practice in which the action is located. One can identify an act of disobedience in the same way as one detects an act of obedience that is motivated by a non-legal reason.

Provided that one is aware of the legal obligation to which the actor responds, then, one can identify an act of obedience or disobedience by observing it from either the internal or the hermeneutic (but not the extreme-external) point of view. To detect an act of deliberate compliance or non-compliance with a legal duty, one must at least be aware of the actor's critical-reflective attitude. But from which perspective might a philosopher subsequently describe this behaviour? According to Dworkin, a philosopher

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<sup>52</sup> Given the nature of acceptance, one cannot simultaneously view two practices from the inside.

cannot make sense of a practice without participating in it.<sup>53</sup> He maintains that one must formulate a theory of deliberate conduct from the internal point of view. I end the present section by suggesting otherwise.

An external observer of a practice, says Dworkin, can do no more than report the convictions of participants as articulated – whether explicitly or implicitly – in their speech. The outcome of this exercise is a neutral account of the practice. It does not discriminate between (but simply notes) the different opinions that participants express about their behaviour.<sup>54</sup> Yet Dworkin contends that a philosopher must interpret (and not merely narrate) the beliefs of participants. An interpretation seeks to isolate the significant elements of a practice by evaluating the convictions of those involved. It thus takes sides in disputes between participants about their conduct. For Dworkin, such evaluation must be internal. He regards acceptance of the sort of norms by which participants are motivated as necessary for interpretation. Hence, he concludes that a philosopher cannot understand a practice from the outside.

According to the version of philosophy on which Dworkin insists, a philosopher simultaneously describes and participates in a practice. Philosophy,

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<sup>53</sup> See R. Dworkin *Law's Empire* (London: Fontana, 1986) 64; R. Dworkin *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006) 141. See also S.R. Perry 'Hart's Methodological Positivism' in J. Coleman (ed.) *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford: Oxford University Press, 2001) 346.

<sup>54</sup> On the possibility of such disagreements, see section four.



on this account, is a way of taking part in (and is not itself) a particular practice. The opinions of a philosopher are simply less concrete than those of other participants. As Dworkin says of jurisprudence: '[A] legal philosopher's theory of law is not different in character from, though it is of course much more abstract than, the ordinary legal claims that lawyers make from case to case.'<sup>55</sup> A philosopher, then, expresses the beliefs of some fellow-participants in a less specific form. Dworkin reckons that the convictions of non-philosophical participants in a practice can always be – even if they seldom are – communicated theoretically. This means that a philosophical translation of every legal opinion is possible:

Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law.<sup>56</sup>

But Dworkin is wrong to think that a philosopher must describe a practice from the inside. Even if he is right about the necessity of interpretation – and, in the fourth section of this chapter, I argue that he is – his claim that it depends on

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<sup>55</sup> R. Dworkin *Justice in Robes* 141.

<sup>56</sup> R. Dworkin *Law's Empire* 90.

internal observation is false. He ignores the possibility of interpretation from the external point of view.

Dworkin fails to grasp the potential for such interpretation because of his belief that external theorists are guilty of 'obscurantism'.<sup>57</sup> He contends that they are unable to contribute to non-philosophical discussions and that their work is relevant to them alone.<sup>58</sup> This allegation follows from his assumption that they cannot do more than present a neutral record of these debates. One might, however, interpret – and so take sides in disputes between participants about – a practice in which one does not (currently<sup>59</sup>) take part. To evaluate the convictions of participants, one need not share their critical-reflective attitude.<sup>60</sup> Rather, one can assess their opinions from the hermeneutic perspective of another practice. My account of pure interpretation, for example, indicates a discrete order of norms on which a philosopher might rely. A pure theorist evaluates the deliberate conduct of others by accepting distinct criteria, such as clarity and consistency.<sup>61</sup> Philosophy, therefore, can be more than a sophisticated mode of participation. It might be an autonomous practice from

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<sup>57</sup> R. Dworkin *Justice in Robes* 170.

<sup>58</sup> See R. Dworkin *Justice in Robes* 185-186.

<sup>59</sup> One might, of course, participate in a practice both prior to and following external analysis of it.

<sup>60</sup> For a similar argument, see M.H. Kramer *In Defense of Legal Positivism: Law without Trimmings* 169-170.

<sup>61</sup> I say more about these values in section six.

which other practices – including those of obedience and disobedience – are analysed.

Yet Dworkin implies that this brand of philosophy is elitist. He says that external theorists 'look down' on the behaviour that they describe.<sup>62</sup> But this slur is no more warranted than his charge of obscurantism. These philosophers take up a perspective that everyone might adopt. Moreover, the practice in which they participate is not better than any other: it is simply *different*. Rather than observe from above, they look *across* at the conduct of people whose critical reflective attitude they do not (presently) share.

Given this alternative conception of philosophy, one can defend an understanding of a practice – other than philosophy, which is necessarily self-justifying – from the outside. Norms of the sort that participants accept need not motivate a philosopher. And Dworkin – rather surprisingly – admits as much. He concedes the possibility of external analysis when he says that 'virtual' participation is sufficient for interpretation.<sup>63</sup> His acknowledgement that one might evaluate a practice in which one does not actually take part negates his claim that a philosopher must make sense of deliberate conduct from the internal point of view. Not only is Dworkin wrong about the need for a

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<sup>62</sup> R. Dworkin *Justice in Robes* 141.

<sup>63</sup> See R. Dworkin *Law's Empire* 422, note 14.

philosopher of a practice to share the critical reflective attitude of participants, but he undermines his own case.

A philosopher, then, might both detect and describe a practice of obedience or disobedience from either the internal or the hermeneutic perspective. But how – and not merely from where – should a philosopher understand this behaviour? The answer depends on the methodological criteria that a description of a practice ought to satisfy. I introduce some means of comprehension in the next section. I do this by looking at the ongoing debate about the methodology employed by Hart in defence of his account of law.

### III

Many commentators wrangle over the way in which Hart describes legal practice.<sup>64</sup> I consider their dispute in this section, but I do not purport (and have no reason for trying<sup>65</sup>) to solve it. My only concern is to set out three distinct methods between which a philosopher of a practice must choose. I look more closely at these philosophical techniques in subsequent sections. My immediate aim is simply to introduce them.

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<sup>64</sup> Hart describes legal practice in general (as opposed to that of a particular society): see H.L.A. Hart *The Concept of Law* 239-240. This distinction has no impact on my argument. For scepticism about the generality of Hart's account, see B.Z. Tamanaha *A General Jurisprudence of Law and Society*.

<sup>65</sup> Nothing in my argument depends on ascertaining Hart's jurisprudential methodology.

A number of commentators maintain that Hart's description of law merely reports the beliefs of legal actors as articulated – whether explicitly or implicitly – in their speech. According to Dworkin, for instance, Hart's theory is 'semantic'.<sup>66</sup> This mode of understanding comprises the single rule that a description of a practice should match the language of participants. It does not analyse the concept of which participants speak. By treating linguistic usage as decisive, it reduces philosophy to lexicography. One might cite the following extract from the preface to *The Concept of Law* as evidence for this reading of Hart's theory of law:

Notwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology; for the suggestion that inquiries into meanings of words merely throw light on words is false. Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated.<sup>67</sup>

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<sup>66</sup> See R. Dworkin *Law's Empire* 34-35; R. Dworkin *Justice in Robes* 31, 165-166, 214. See also D. Lyons 'Moral Aspects of Legal Theory' in M. Cohen (ed.) *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984) 64; N. Stavropoulos 'Hart's Semantics' in J. Coleman (ed.) *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press, 2001) 59.

<sup>67</sup> H.L.A. Hart *The Concept of Law* v.

Jules Coleman, however, says that 'Hart's aim is not to report on usage, but to analyse the concept of law.'<sup>68</sup> And Hart himself emphatically denies that he makes sense of legal practice by simply recording the language of its participants: '[N]othing in my book or in anything else I have written supports such an account of my theory.'<sup>69</sup> Certainly, his reference to 'descriptive sociology' – which Dworkin finds 'baffling'<sup>70</sup> – cannot be understood as a commitment to ordinary-language philosophy given his implicit admission (in the quoted extract) that 'inquiries into the meaning of words' do not supplant his 'concern with analysis'. Although he insists that an appreciation of everyday speech is necessary, he appears to reject its sufficiency. He professes to do more than list the beliefs of those who take part in legal practice. Hart thus dismisses the allegation that he is in thrall to ordinary language. Whether his rejection indicates a lack of self-understanding – as Dworkin and others might allege – is not my interest here.

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<sup>68</sup> J. Coleman 'Methodology' in J. Coleman & S. Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 313. See also M. Bayles 'What is Jurisprudence About? Theories, Definitions, Concepts or Conceptions of Law' 18 *Philosophical Topics* (1990) 23, at 29; M. Bayles 'Hart vs Dworkin' 10 *Law and Philosophy* (1991) 349, at 360; T. Endicott 'Herbert Hart and the Semantic Sting' in J. Coleman (ed.) *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford: Oxford University Press, 2001) 39-47.

<sup>69</sup> H.L.A. Hart *The Concept of Law* 246.

<sup>70</sup> R. Dworkin *Justice in Robes* 165. See also 214.



Perhaps, then, analysis (and not lexicography) is Hart's project. To analyse the concept of law, one must identify the significant aspects of legal practice. This requires evaluation (rather than mere narration) of the beliefs of legal actors. Such an assessment depends on criteria according to which one can discriminate between the opinions of those who accept legal rules. Some commentators declare – indeed, Stephen Guest is 'in no doubt'<sup>71</sup> – that Hart relies on moral norms. They say that his description of law results from moralistic interpretation.

As apparent proof of Hart's dependence on morality, many of these commentators refer to his contention that his theory of legal positivism improves moral deliberation by 'preserving the sense that the certification of something as legally valid is not conclusive of the question of obedience'.<sup>72</sup>

MacCormick belongs to this subgroup. He states:

Paradoxical as some may find it, Hart's reason for insisting on the conceptual separateness of 'law' and 'morality' is [...] a moral reason. Hart is a positivist because he is a critical moralist. His aim is not to issue a warrant for obedience to the masters of the state. It

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<sup>71</sup> S. Guest 'Two Strands in Hart's Theory of Law: A Comment on the "Postscript" to Hart's *The Concept of Law*' in S. Guest (ed.) *Positivism Today* (Aldershot: Dartmouth, 1996) 30.

<sup>72</sup> H.L.A. Hart *The Concept of Law* 210. For further discussion, see H.L.A. Hart 'Positivism and the Separation of Law and Morals' in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 72-78; H.L.A. Hart *The Concept of Law* 207-212.

is to reinforce the citizen's warrant for unrelenting moral criticism of the uses and abuses of state power.<sup>73</sup>

Contrary to his depiction elsewhere of Hart as a semantic theorist, Dworkin regards the alleged impact of legal positivism on moral decision-making as 'Hart's main argument' for the possible iniquity of legal rules.<sup>74</sup> Unlike MacCormick, however, Dworkin refuses to classify this argument as moral. Instead, he says that Hart appeals to 'some hypothesis about how to think clearly about the issues he mentions.'<sup>75</sup> Regardless of whether one agrees with Dworkin or MacCormick, Hart is adamant that his theory 'is morally neutral and has no justificatory aims'.<sup>76</sup> He explicitly rejects moralistic interpretation. Even if the supposed consequences of legal positivism are morally valuable, Hart denies that his description of law is contingent on them. They are, he

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<sup>73</sup> D.N. MacCormick *H.L.A. Hart* 160. See also S. Guest *Ronald Dworkin* (Edinburgh: Edinburgh University Press, 1992) 27; S. Guest 'Justice, Law and Ronald Dworkin: Jurisprudence at the End of the Century' 51 *Current Legal Problems* (1998) 335, at 342; M. Kramer 'Dogmas and Distortions: Legal Positivism Defended' 21 *Oxford Journal of Legal Studies* (2001) 673, at 683; D.N. MacCormick 'A Moralistic Case for A-moralistic Law?' 20 *Valparaiso University Law Review* (1985) 1, at 10; F. Schauer 'Positivism Through Thick and Thin' in B. Bix (ed.) *Analyzing Law: New Essays in Legal Theory* (Oxford: Clarendon Press, 1998) 69-70.

<sup>74</sup> See R. Dworkin 'A Reply by Ronald Dworkin' in M. Cohen (ed.) *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984) 254.

<sup>75</sup> R. Dworkin 'A Reply by Ronald Dworkin' 255.

<sup>76</sup> H.L.A. Hart *The Concept of Law* 240. See also J. Coleman 'Methodology' 336; W.J. Waluchow *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994) 98, note 29.

implies, merely a beneficial side-effect of legal positivism. At most, he would claim that he is – to use John Gardner's expression – a 'positivity-welcomer'.<sup>77</sup>

Although Hart dismisses moralistic interpretation, Stephen Perry is convinced that he 'applies such a methodology in *The Concept of Law* when he limits law to normative systems with a rule of recognition, thereby excluding social practices that consist of primary social rules alone.'<sup>78</sup> For Hart, a regime comprising only primary rules – namely, those that establish duties – suffers from certain defects: it lacks a way in which any doubt concerning the identity of its rules might be eradicated; it has no procedures for creating new and extinguishing current obligations; and it needs an effective mechanism for deciding whether specific rules have been infringed.<sup>79</sup> Hart says that these deficiencies are cured by 'supplementing the *primary* rules of obligation with *secondary* rules which are rules of a different kind.'<sup>80</sup> The latter 'specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.'<sup>81</sup> According to Hart, a 'rule of recognition' solves the problem of uncertainty,

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<sup>77</sup> See J. Gardner 'Legal Positivism: 5½ Myths' 46 *American Journal of Jurisprudence* (2001) 199, at 205.

<sup>78</sup> S.R. Perry 'Interpretation and Methodology in Legal Theory' in A. Marmor (ed.) *Law and Interpretation: Essays in Legal Philosophy* (Oxford: Clarendon Press, 1995) 118.

<sup>79</sup> See H.L.A. Hart *The Concept of Law* 92-94.

<sup>80</sup> H.L.A. Hart *The Concept of Law* 94.

<sup>81</sup> H.L.A. Hart *The Concept of Law* 94.

'rules of change' facilitate both the creation of new and the abolition of existing duties and 'rules of adjudication' allow for the efficient resolution of disputes.<sup>82</sup> The introduction of these secondary rules, he says, 'convert[s] the regime of primary rules into what is indisputably a legal system.'<sup>83</sup> Given Hart's belief that law remedies the defects of a regime comprising only duty-imposing rules, Perry concludes that Hart 'delimit[s] the concept of law by appealing to the values of certainty, flexibility, and efficiency.'<sup>84</sup> Dworkin – in contradiction of his other (inconsistent) statements about Hart's methodology – also infers that Hart relies on these moral values to justify his legal theory.<sup>85</sup>

Yet the conclusion that Hart's description of law is the product of moralistic interpretation need not follow from his contention that a legal system effects certainty, flexibility and efficiency. These values need not be his motivation for including secondary rules in his theory. Indeed, Coleman says that Hart's discussion of the shift from a pre-legal regime to a legal system might be understood as 'a kind of social-scientific/functionalist explanation of law [that] reinforces the philosophical analysis of law as a union of primary and secondary rules, and makes the philosophical theory continuous with a

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<sup>82</sup> See H.L.A. Hart *The Concept of Law* 94-97.

<sup>83</sup> H.L.A. Hart *The Concept of Law* 94.

<sup>84</sup> S.R. Perry 'Interpretation and Methodology in Legal Theory' 118.

<sup>85</sup> See R. Dworkin 'A Reply by Ronald Dworkin' 255.

standard social scientific explanation.<sup>86</sup> Rather than using the values of certainty, flexibility and efficiency to justify his description of legal practice, in other words, perhaps Hart mentions them to explain its historical development.

Incidentally, the dispute as to whether Hart engages in moralistic interpretation is part of a more general debate over the extent to which this methodology features in the history of legal positivism.<sup>87</sup> Some commentators believe that the legal-positivist tradition is dominated by moralistic theorists.<sup>88</sup> Others, however, think that legal positivists – both past and present – generally eschew moralistic interpretation. In fact, MacCormick calls such avoidance ‘the great positivistic fallacy’.<sup>89</sup>

The third methodology that several commentators attribute to Hart is also a form of interpretation. According to this mode of understanding, a description of a practice ought only to meet certain ‘meta-theoretical’ standards,

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<sup>86</sup> J. Coleman ‘Methodology’ 342. See also J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001) 207.

<sup>87</sup> For discussion, see G.J. Postema *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986) 328-330; P. Soper ‘Choosing a Legal Theory on Moral Grounds’ in J. Coleman & E.F. Paul (eds) *Philosophy and Law* (Oxford: Basil Blackwell, 1987) 31.

<sup>88</sup> See T.D. Campbell *The Legal Theory of Ethical Positivism* (Aldershot: Dartmouth, 1996) 74; D. Dyzenhaus ‘Positivism’s Stagnant Research Programme’ 20 *Oxford Journal of Legal Studies* (2000) 703, at 708-709; D. Dyzenhaus ‘The Genealogy of Legal Positivism’ 24 *Oxford Journal of Legal Studies* (2004) 39.

<sup>89</sup> D.N. MacCormick ‘The Ethics of Legalism’ 2 *Ratio Juris* (1989) 185, at 189. See also S. Guest ‘Why the Law is Just’ 53 *Current Legal Problems* (2000) 31, at 51; D. Lyons ‘Moral Aspects of Legal Theory’ 64.



such as clarity and consistency.<sup>90</sup> Because it specifies criteria that are exclusively non-moral for analysing the beliefs of participants, I call it 'pure' interpretation. Coleman says that Hart 'quite clearly' adopts this means of comprehension when describing legal practice.<sup>91</sup> Dworkin, moreover, implies that Hart is a pure theorist when he attributes Hart's legal positivism to a desire for clarity.<sup>92</sup> Indeed, Hart himself seems to advocate pure interpretation in the following passage:

[A legal theorist] must [...] be guided, in focusing on [some] features rather than others, by some criteria of importance of which the chief will be the explanatory power of what his analysis picks out. So his analysis will be guided by judgements, often controversial, of what is important and will therefore reflect such meta-theoretic values and not be neutral between all values.<sup>93</sup>

Yet Hart's apparent insistence on pure interpretation is complicated by his assertion that 'explanatory power' is the primary meta-theoretical value. Far from being a philosophical norm, explanatory power *results from* the application of such norms.<sup>94</sup> Whether a theory exhibits this quality, in other words, depends

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<sup>90</sup> I say more about these standards in the penultimate section of this chapter.

<sup>91</sup> See J. Coleman 'Methodology' 335-336. See also J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 201; J. Dickson 'Methodology in Jurisprudence: A Critical Survey' 10 *Legal Theory* (2004) 117; W.J. Waluchow *Inclusive Legal Positivism* 98, note 29.

<sup>92</sup> See R. Dworkin 'A Reply by Ronald Dworkin' 255.

<sup>93</sup> H.L.A. Hart 'Comment' in R. Gavison (ed.) *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Oxford: Clarendon Press, 1987) 39. On 'explanatory power', see also H.L.A. Hart *The Concept of Law* 81, 155.

<sup>94</sup> For a similar argument, see G.J. Postema 'Jurisprudence as Practical Philosophy' 4 *Legal Theory* (1998) 329, at 334.





on the methodological criteria that it ought to satisfy. Hence, a theorist for whom philosophy is equivalent to lexicography would credit explanatory power to a description of a practice that simply records the language of participants. The same theorist would claim, moreover, that a moralistic or a pure interpretation of a practice lacks this capacity. Hart's reliance on explanatory power, then, simply begs (rather than answers) the question of the appropriate method for describing a practice.

In spite of disagreement about the means of comprehension that Hart employs, I express no opinion on whether he engages in philosophy as lexicography, moralistic interpretation or pure interpretation. I mention the controversy regarding his methodology only as a way of introducing some different philosophical techniques for understanding intentional conduct (including acts of obedience and disobedience to the law). In the next three sections of this chapter, I consider each of these approaches in turn.

#### **IV**

Should a description of a practice simply report the beliefs of those who take part in it? For some theorists, philosophy as lexicography is defeated by the fact that participants do not always agree about their behaviour. I argue here that a

particular form of this objection succeeds. Having rejected philosophy as lexicography, I then comment on the need for interpretation.

My critique supposes that participants are able to disagree about their practice. According to Dworkin, however, some legal philosophers deny the possibility of such disputes. I start by presenting his convincing reply to this denial.

Dworkin says that disagreement between those who take part in a legal practice is either 'empirical' or 'theoretical'. Conflict of the former type occurs whenever legal actors 'agree about the grounds of law – about when the truth or falsity of other, more familiar propositions makes a particular proposition of law true or false – but disagree about whether those grounds are in fact satisfied in a particular case.'<sup>95</sup> Their dispute is 'theoretical' if 'they disagree about the grounds of law, about which other kinds of propositions, when true, make a particular proposition of law true.'<sup>96</sup> Dworkin's label for quarrels of the second sort is rather misleading, however, given that a theorist of a practice need not share the critical reflective attitude of participants in it.<sup>97</sup> I thus regard 'substantive' as a more appropriate epithet than 'theoretical' for debates between lawyers about the grounds of law.

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<sup>95</sup> R. Dworkin *Law's Empire* 4.

<sup>96</sup> R. Dworkin *Law's Empire* 5.

<sup>97</sup> See section two of this chapter.

Legal philosophers who reject the possibility of substantive discord, says Dworkin, assume that '[w]e follow shared rules in using any word: these rules set out criteria that supply the word's meaning.'<sup>98</sup> By supposing that participants always agree about their practice, these philosophers dismiss clashes over the grounds of law as merely apparent. For them, 'the only sensible disagreement about law is empirical disagreement'.<sup>99</sup> Dworkin, though, argues that legal actors often contest the meaning of law.<sup>100</sup> To deny the authenticity of these disputes, he says, 'fits badly with the kind of disagreements lawyers actually have.'<sup>101</sup> Indeed, he accuses philosophers for whom legal criteria must be shared of reducing law to 'a grotesque joke'<sup>102</sup> because they infer participation in different legal practices from the lack of substantive consensus and reach the 'absurd'<sup>103</sup> conclusion that 'arguments [about the grounds of law] are pointless in the most trivial and irritating way, like an argument about banks when one person has in mind savings banks and the other riverbanks.'<sup>104</sup>

Of course, substantive conflict also exists between participants in non-legal practices. Moral actors, for instance, often apply different principles to the

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<sup>98</sup> R. Dworkin *Law's Empire* 31.

<sup>99</sup> R. Dworkin *Law's Empire* 31.

<sup>100</sup> See R. Dworkin *Law's Empire* 15-30.

<sup>101</sup> R. Dworkin *Law's Empire* 46.

<sup>102</sup> R. Dworkin *Law's Empire* 44.

<sup>103</sup> R. Dworkin *Law's Empire* 45.

<sup>104</sup> R. Dworkin *Law's Empire* 44.

same circumstances. Yet in no practice can participants always disagree: they must at least have the same critical-reflective attitude. Although they might differ as to the individual rules of which their practice consists, the *kind* of rules that they accept must be identical. Their dispute supposes agreement on the order of reasons by which they are motivated. But maybe philosophy as lexicography requires more than such consensus. I now examine the possibility that it is defeated by substantive conflict.

If a description of a practice ought to match the language of participants, then a theorist must simply report substantive discord. Philosophy as lexicography cannot discriminate between the competing beliefs that participants hold about their practice. When faced with substantive debate, an ordinary-language philosopher must copy the speech of all disputants. According to Michael Bayles, legal theories that reproduce arguments between lawyers concerning the grounds of law are 'uninteresting'.<sup>105</sup> Matthew Kramer also criticises descriptions of legal practice that record substantive disagreement. He bemoans their failure to 'yield a fully uniform account that could be associated with the internal perspective of the participant'.<sup>106</sup> Theories of non-

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<sup>105</sup> See M.D. Bayles 'What is Jurisprudence About? Theories, Definitions, Concepts or Conceptions of Law' 31, 38.

<sup>106</sup> M.H. Kramer *In Defense of Legal Positivism: Law without Trimmings* 169.

legal practices that report substantive discord would presumably be subject to the same objections.

Yet these attacks do not defeat philosophy as lexicography. They assume (rather than establish) that a theorist should do more than record substantive disputes. Whether a theory is interesting depends on the methodological criteria that it ought to satisfy. That Bayles is not inspired by reports of arguments between legal actors concerning the grounds of law follows from (rather than causes) his rejection of philosophy as lexicography. Likewise, Kramer's insistence on a coherent description of a practice supposes the inadequacy of merely recording everyday speech. These theorists regard substantive disputes as fatal to philosophy as lexicography only because they rely on a methodology that solves (rather than reproduces) disagreements of this type.

One cannot prove that substantive conflict defeats philosophy as lexicography by assuming the superiority of another mode of understanding. But one might claim that substantive discord undermines philosophy as lexicography *from within*. My critique of this methodology is, therefore, internal. I argue that disagreement between *philosophers* about their practice contradicts philosophy as lexicography. Because methodological rules state the means by which one ought to comprehend a practice, every methodology must be self-

justifying. To defend philosophy as lexicography, then, one must report the language of philosophers. Yet this defence succeeds only if every philosopher believes in philosophy as lexicography. In fact, not all philosophers treat linguistic usage as decisive. They obviously disagree about the criteria that a description of a practice ought to satisfy. Since philosophy as lexicography must reproduce their dispute, it cannot support itself. Philosophical debate is thus fatal to philosophy as lexicography.

Given the existence of substantive conflict between philosophers, a theorist of any practice must interpret (rather than simply report) the beliefs of participants. The necessity of interpretation follows from the impossibility of ordinary-language philosophy. When interpreting a practice, a theorist analyses the concept of which participants speak. Such analysis produces a *conception* of the concept.<sup>107</sup> This conception is an attempt to isolate that which is significant about the concept. With the failure of philosophy as lexicography, a theorist must aim to reject the trivial elements of a practice. As Leslie Green states: 'A [theory] of something is [...] never a statement of all the facts about it: it is a selection of those facts that are taken to be for some purposes important, salient,

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<sup>107</sup> On the difference between concepts and conceptions, see J. Rawls *A Theory of Justice* (Revised edition) (Oxford: Oxford University Press, 1999) 5.



relevant, interesting, and so on.’<sup>108</sup> The claims of significance of which interpretation consists are, of course, evaluative. Raz acknowledges the need for appraisal when he says that a legal theorist must ‘engage in evaluative judgment, for such judgment is inescapable in trying to sort out what is central and significant in the common understanding of the concept of law.’<sup>109</sup> John Finnis also recognises that a theory of a practice must be an assessment of it: ‘[T]he evaluations of the theorist himself are an indispensable and decisive component in the selection or formation of any [conceptions] for use in description of such aspects of human affairs as law or legal order.’<sup>110</sup>

Consider, for example, the impact on moral theory of this need for interpretation. Due to the impossibility of ordinary-language philosophy, a theory of moral practice must be ‘critical’. Such a theory is an attempt to improve the ‘positive’ morality of everyday speech.<sup>111</sup> As MacCormick states: ‘Critical morality seeks to exhibit and lay bare the value assumptions implicit in

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<sup>108</sup> L. Green ‘The Concept of Law Revisited’ 94 *Michigan Law Review* (1996) 1687, at 1713. See also J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 179; J. Dickson *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001) 25; J. Finnis *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) 17; M.H. Kramer *In Defense of Legal Positivism: Law without Trimmings* 179; M. Kramer ‘Dogmas and Distortions: Legal Positivism Defended’ 688; J. Raz *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 41; J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Revised edition) (Oxford: Clarendon Press, 1995) 237.

<sup>109</sup> J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 237.

<sup>110</sup> J. Finnis *Natural Law and Natural Rights* 16. See also J. Coleman ‘Methodology’ 313.

<sup>111</sup> On the distinction between ‘positive’ and ‘critical’ morality, see H.L.A. Hart *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963) 20.

positive morality, to reassess these [...] and thus to develop critical principles by reference to which we can reappraise and re-orient our ordinary day to day [...] standards of judgment.<sup>112</sup> A critical moralist analyses (and might eventually alter<sup>113</sup>) positive morality. That a theory of morality must be critical is entailed by the failure of philosophy as lexicography.

Although philosophy as lexicography is defeated by the existence of substantive disagreement between philosophers, a theorist cannot ignore everyday speech. An interpretation of a practice must start from the language of those who participate in it.<sup>114</sup> Their use of words is the phenomenon that requires analysis. Before interpreting a practice, then, a theorist must report the beliefs of participants. In Dworkin's words: '[T]here must be a "preinterpretive" stage in which the rules and standards taken to provide the tentative content of the practice are identified.'<sup>115</sup> Yet how far might conceptual analysis revise ordinary speech? Were no modifications possible, interpretation would be

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<sup>112</sup> D.N. MacCormick *H.L.A. Hart* 50.

<sup>113</sup> See D.N. MacCormick *H.L.A. Hart* 54. According to my analysis in section two of this chapter, the impact of a critical theory on moral practice depends on the power of the theorist to modify the behaviour of participants. Richard Posner denies that 'academic moralists' – among whom he includes Dworkin – are able to achieve such change and claims that only 'moral entrepreneurs' have the persuasive skills that are necessary to do so: see R.A. Posner *The Problematics of Moral and Legal Theory* (Cambridge, Mass.: Harvard University Press, 1999) chapter one.

<sup>114</sup> See, for example, P. Morriss *Power: A Philosophical Analysis* (Manchester: Manchester University Press, 1987) 3.

<sup>115</sup> R. Dworkin *Law's Empire* 65-66. See also J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 199-200; J. Coleman 'Methodology' 336.

equivalent to philosophy as lexicography. Excessive departure from the normal use of words, however, would result in the creation of an imaginary (as opposed to a theory of an actual) practice. As Dworkin states: '[An interpretation] need not fit every aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one.'<sup>116</sup> The extent to which a theorist might alter normal language is limited, therefore, by consideration of the distinction between interpretation and invention.

In this section, I have argued that philosophy as lexicography cannot justify a description of a practice because – given the fact of substantive disagreement between philosophers – it cannot justify itself. With the failure of this mode of understanding, a theorist of any practice must interpret the beliefs of participants (and thus produce a conception of the relevant concept). Although the need for interpretation does not allow one to ignore ordinary language, the defeat of philosophy as lexicography does require evaluation of the normal use of words. Numerous legal philosophers justify such an assessment on moral grounds. Their approach is the topic of the next section.

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<sup>116</sup> R. Dworkin *Law's Empire* 66. See also J. Waldron 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' 20 *Law and Philosophy* (2002) 137, at 138.

## V

A theorist who relies on moral criteria to defend an understanding of a practice provides a moralistic interpretation of it. Since many legal philosophers offer moral support for their theories of law, I discuss this methodology with reference to their work. Drawing on Julie Dickson's helpful examination of jurisprudential method, I consider some attitudes of these philosophers towards moralistic interpretation and conclude by isolating the belief whose rejection is my aim in this chapter.

First, though, I must deal with a terminological matter. According to Gerald Postema, theorists who subject legal practice to moral appraisal are exponents of 'normative jurisprudence'.<sup>117</sup> Yet his language is unhelpful. It suggests that the only norms that a legal theorist might consult when analysing the concept of law are moral and thus excludes the possibility of selecting the important aspects of legal practice on non-moral grounds. Since my aim in this chapter is to deny the need for moralistic interpretation, I reject Postema's choice of words. Consequently, I also refuse to follow Jeremy Waldron's

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<sup>117</sup> See G.J. Postema *Bentham and the Common Law Tradition* 328-335.

application of the label 'normative positivists' to theorists whose legal positivism results from moralistic interpretation.<sup>118</sup>

Dickson identifies three distinct theses concerning moralistic interpretation to which a legal philosopher might subscribe: the 'moral-evaluation' thesis, the 'moral-justification' thesis and the 'beneficial-moral-consequences' thesis.<sup>119</sup> I consider each in turn.

The 'moral-evaluation' thesis states that a theorist cannot make sense of law without reference to morality.<sup>120</sup> As Dickson recognises, both Finnis and Dworkin embrace the moral-evaluation thesis. To understand law, says Finnis, a theorist must consult its focal meaning.<sup>121</sup> The (moral) requirements of 'practical reasonableness' determine the central case of law for him. He states that a legal philosopher must rely on these requirements:

If there is a viewpoint in which the institution of the Rule of Law [...], and compliance with rules and principles of law according to their tenor, are regarded as at least presumptive requirements of practical reasonableness itself, such a viewpoint is the viewpoint which should be used as the standard of reference by the theorist describing the features of legal order.<sup>122</sup>

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<sup>118</sup> See J. Waldron *Law and Disagreement* (Oxford: Oxford University Press, 1999) 167; J. Waldron 'Normative (or Ethical) Positivism' in J. Coleman (ed.) *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford: Oxford University Press, 2001).

<sup>119</sup> See J. Dickson *Evaluation and Legal Theory* 9, 29.

<sup>120</sup> For discussion, see J. Dickson *Evaluation and Legal Theory* chapter two.

<sup>121</sup> Finnis defends the moral-evaluation thesis in chapter one of *Natural Law and Natural Rights*.

<sup>122</sup> J. Finnis *Natural Law and Natural Rights* 15.



While Finnis holds that a legal philosopher must defend an understanding of law in terms of the requirements of practical reasonableness, Dworkin promotes the moral-evaluation thesis by insisting on the 'constructive interpretation' of every practice. Such interpretation 'is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.'<sup>123</sup> A theory of a practice, says Dworkin, must fit the language of participants and explain 'why a practice of that general shape is worth pursuing, if it is.'<sup>124</sup> This requires a theorist to 'propose[...] value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify.'<sup>125</sup> Dworkin claims that the function of law is moral:

[T]he most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.<sup>126</sup>

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<sup>123</sup> R. Dworkin *Law's Empire* 52.

<sup>124</sup> R. Dworkin *Law's Empire* 66. See also R. Dworkin *Justice in Robes* 15.

<sup>125</sup> R. Dworkin *Law's Empire* 52.

<sup>126</sup> R. Dworkin *Law's Empire* 93.



Dworkin regards the moral justification of governmental force or – to be more succinct – the value of legality as the purpose of law.<sup>127</sup> He says that a legal philosopher must describe law according to this goal. Dworkin thus adheres to the moral-evaluation thesis. He agrees with Finnis that a legal theorist must subject law to moral appraisal. 'The cutting edge of a jurisprudential argument,' declares Dworkin, 'is its moral edge.'<sup>128</sup>

Dickson also portrays Finnis and Dworkin as advocates of the 'moral-justification' thesis, which states that a legal theorist must treat law as morally justified.<sup>129</sup> She says that both of them explain their adherence to the moral-justification thesis using the same reasons as those for which they assert that a legal philosopher must morally evaluate law. According to Dickson, Finnis holds that a theory of legal practice cannot fail to satisfy the requirements of practical reasonableness,<sup>130</sup> whereas Dworkin's assent to the moral-justification thesis is 'driven by his view of the function of law.'<sup>131</sup>

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<sup>127</sup> See R. Dworkin *Justice in Robes* 5, 168-171.

<sup>128</sup> R. Dworkin *Justice in Robes* 178.

<sup>129</sup> For discussion, see J. Dickson *Evaluation and Legal Theory* chapter four.

<sup>130</sup> See J. Dickson *Evaluation and Legal Theory* 71-73.

<sup>131</sup> J. Dickson *Evaluation and Legal Theory* 107.

But Dickson's attribution of the moral-justification thesis to Finnis and Dworkin is not convincing.<sup>132</sup> Finnis says that a legal philosopher must regard the focal meaning of law as consistent with the requirements of practical reasonableness. Although he is adamant that a theory of law must *refer* to these requirements, he does not say that it must always *fulfil* them. For Finnis, an unjust law is nevertheless a law (albeit in a secondary sense).<sup>133</sup> His distinction between the central and peripheral cases of law would be redundant were he to insist on the practical reasonableness of every legal norm. Similarly, Dworkin does not suggest that a theorist for whom legal practice sometimes fails to provide governmental force with a moral warrant is incapable of understanding law. He acknowledges that the language of participants – which a constructive interpretation must fit – can prevent a theory of legal practice from achieving this purpose.

Whether or not Finnis and Dworkin hold that a legal philosopher must treat law as morally justified, Dickson is right to deny that the moral-justification thesis follows automatically from the moral-evaluation thesis. She recognises that the former cannot be established simply by proving the latter

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<sup>132</sup> Indeed, she admits that Finnis might object to her interpretation of his work: see J. Dickson *Evaluation and Legal Theory* 74-78. See also M.H. Kramer 'Book Review' [2003] *Cambridge Law Journal* 210, at 211-213; M. McBride 'Book Review' 66 *Modern Law Review* (2003) 661, at 663.

<sup>133</sup> See J. Finnis *Natural Law and Natural Rights* 363-366.

when she notes that the moral-evaluation thesis 'is a methodological precept which could be accepted by a critical race theorist who believes that in many instances, law operates in a way which results in great injustice to persons of colour.'<sup>134</sup> Hence, the moral-justification thesis is merely a particular version of (and thus entails) the moral-evaluation thesis. While dismissal of the moral-evaluation thesis implies rejection of the moral-justification thesis, the converse is not true.

According to the moral-evaluation and moral-justification theses, moralistic interpretation of legal practice is necessary. The 'beneficial-moral-consequences' thesis, however, states only that a specific type of moralistic jurisprudence is *possible*. For philosophers who accede to this thesis, an understanding of law can be supported by the moral advantages (and, I presume, defeated by the moral disadvantages) to which it gives rise.<sup>135</sup> Some theorists defend legal positivism by claiming that their description of law improves moral deliberation. These legal positivists – unlike mere positivity-welcomers – subscribe to the beneficial-moral-consequences thesis. All of them believe that the moral effects of legal positivism might vindicate (and are not

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<sup>134</sup> J. Dickson *Evaluation and Legal Theory* 73.

<sup>135</sup> For discussion, see J. Dickson *Evaluation and Legal Theory* chapter five.

just an incidental benefit of) their interpretations of law.<sup>136</sup> They include Jeremy Bentham,<sup>137</sup> Neil MacCormick,<sup>138</sup> Frederick Schauer<sup>139</sup> and Liam Murphy.<sup>140</sup> Whether Hart also belongs to this group is a moot point.<sup>141</sup>

Lon Fuller says that legal positivism fails to bring about the moral advantages on which these theorists depend.<sup>142</sup> Indeed, he regards its moral consequences as a reason for dismissing it (in favour of another description of legal practice). David Dyzenhaus repudiates legal positivism in the same way:

We should, I maintain, adopt the view of law that gives us the best results in practice. Given that judges are at the centre of legal practice, we should adopt the view of law that judges should adopt if they are to make the best sense of practice. I have thus largely limited my evaluation of the positivist theory of law to an assessment of the consequences for morality and practice if judges adopt positivist ideas in a particular wicked legal system. And I have argued, on the ground of such consequences, for the view taken by the Common Law tradition. For what more could be asked of the correct view of law than that it lead to morally good

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<sup>136</sup> They might also believe that a theory of law must be justified in terms of its moral results. Yet whether they subscribe to this version of the moral-evaluation thesis is not my concern here. I note only that they regard a moral-consequentialist justification for a theory of law as possible.

<sup>137</sup> On Bentham's methodology, see G.J. Postema *Bentham and the Common Law Tradition* 328-332.

<sup>138</sup> See D.N. MacCormick 'A Moralistic Case for A-moralistic Law?'

<sup>139</sup> See F. Schauer 'Positivism as Pariah' in R.P. George (ed.) *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996).

<sup>140</sup> See L. Murphy 'The Political Question of the Concept of Law' in J. Coleman (ed.) *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press, 2001); L. Murphy 'Concepts of Law' 30 *Australian Journal of Legal Philosophy* (2005) 1.

<sup>141</sup> See section three of this chapter.

<sup>142</sup> See L.L. Fuller 'Positivism and Fidelity to Law – A Reply to Professor Hart' 71 *Harvard Law Review* (1958) 630, at 657-661.

results and that it make sense of and perpetuate healthy legal practice?<sup>143</sup>

Insofar as their critique hinges on the moral results of legal positivism, Fuller and Dyzenhaus assent to the beneficial-moral-consequences thesis. Their dispute with legal positivists like MacCormick is empirical, not philosophical. Whether legal positivism (or any other description of law) generates moral benefits is a (difficult) question of fact. Rather than speculating on its answer, though, I wish to comment briefly on Dickson's rejection of the methodological proposition on which all of these theorists agree.

Dickson contends that the beneficial-moral-consequences thesis is false. She denies the possibility of justifying an interpretation of legal practice with reference to its moral effects. Such an argument, she says, 'runs in the wrong direction, *from* premises consisting of a claim about the beneficial consequences of espousing a certain theoretical understanding of law, *to* the conclusion that this way of understanding the law is therefore correct.'<sup>144</sup> Dickson accuses philosophers who subscribe to the beneficial-moral-consequences thesis of

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<sup>143</sup> D. Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991) 269-270. See also D. Dyzenhaus *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press, 1997).

<sup>144</sup> J. Dickson *Evaluation and Legal Theory* 89. See also W.J. Waluchow *Inclusive Legal Positivism* 99.



'reduc[ing] legal theory to no more than an exercise in wishful thinking'.<sup>145</sup> In other words, she supposes that they invent (rather than interpret) legal practice.<sup>146</sup>

But her assumption is not valid. There is no reason to think that an adherent to the beneficial-moral-consequences thesis cannot respect ordinary speech to the extent required for a theory of law to be an interpretation (as opposed to an invention). An evaluation of legal practice based on its moral results need not be less compatible with the language of participants than any other sort of assessment. Dickson does not explain her claim that a philosopher who justifies an understanding of law in terms of its moral consequences 'fails to take seriously the enterprise of attempting accurately and adequately to characterise what is distinctive about law as an actually existing institution.'<sup>147</sup> She simply ignores the possibility that the distinctive aspects of law might be identified by the moral advantages to which they give rise. Hence, Dickson is mistaken: a description of law *can* – which does not mean that it must – be supported by the moral advantages that it produces.<sup>148</sup>

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<sup>145</sup> J. Dickson *Evaluation and Legal Theory* 90. See also J. Dickson 'Methodology in Jurisprudence: A Critical Survey' 148-149.

<sup>146</sup> On this distinction, see section four.

<sup>147</sup> J. Dickson *Evaluation and Legal Theory* 92.

<sup>148</sup> For Schauer's response to Dickson's critique, see F. Schauer 'The Social Construction of the Concept of Law: A Reply to Julie Dickson' 25 *Oxford Journal of Legal Studies* (2005) 493.



Despite such errors, Dickson provides a useful survey of moralistic jurisprudence by setting out three different propositions on the subject of moralistic interpretation to which a legal philosopher might assent. According to the moral-evaluation thesis, a theorist cannot understand law without subjecting legal practice to moral appraisal. This proposition might be expressed another way: moralistic interpretation is necessary if a philosopher wishes to make sense of law. Although both Dworkin and Finnis subscribe to the moral-evaluation thesis, Dickson is wrong to say that they also believe in the moral-justification thesis. By declaring the need for a legal theorist to treat law as morally justified, this second proposition is no more than a specific version of the moral-evaluation thesis. But it is not a version that Dworkin and Finnis must or, in fact, do support. Moreover, they do not – although other theorists do – endorse the beneficial-moral-consequences thesis, which asserts merely that a legal philosopher can refer to the moral effects of a particular description of law.

Consideration of Dickson's taxonomy of some jurisprudential attitudes towards moralistic interpretation is, I hope, an effective way of exploring the philosophical technique of relying on moral criteria to defend an understanding of a practice. Of course, my quarrel is not with every moralistic philosopher. To establish the possibility of pure theory, I need only deny the *necessity* of

moralistic interpretation. My argument is, therefore, compatible with a belief in the *possibility* of offering moral support (whether consequentialist or otherwise) for an understanding of deliberate conduct. Nevertheless, it is at odds with the claim – which Dickson calls the moral-justification thesis when made in a jurisprudential context – that a theorist cannot describe a practice without treating the behaviour of participants as morally justified. As a specific version of the more general proposition that a philosopher must defend an understanding of a practice on moral grounds, this claim is inconsistent with my rejection of the need for moralistic interpretation. But why do I deny that a theorist must cite moral norms in support of a description of a practice? I present my case against the necessity of moralistic interpretation in the next two sections.

## VI

Given the failure of philosophy as lexicography, a theorist cannot make sense of a practice without analysing it.<sup>149</sup> In the absence of a non-moral mode of analysis, moralistic interpretation is necessary by default. Hence, I must start my argument against the need for moralistic interpretation by describing a form of

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See section four.

analysis in which morality has no place. That is my task in this section. Once again, my discussion focuses on jurisprudence.

A number of theorists purport to evaluate legal practice without reference to moral criteria. Matthew Kramer, for example, states:

Dworkin [...] argu[es] on moral grounds for his moralized conception of law and legal rights, whereas I have argued [...] on analytical grounds for a positivist conception of law. My positivist orientation is methodological as well as substantive. To be sure, a reliance on analytical grounds must involve judgments about the importance or unimportance of various aspects of the phenomena that are being pondered. Much the same is true of any theory about anything. But judgments of importance are not perforce moral judgments; the considerations that have guided my focus throughout this book are nonmoral considerations.<sup>150</sup>

Notwithstanding his use of confusing terminology – as Perry notes, a natural lawyer might be a ‘methodological positivist’<sup>151</sup> – and his assumption that ‘analytical grounds’ cannot be moral, Kramer expresses a definite commitment to pure interpretation. Similarly, Jules Coleman declares that his analysis of legal practice ‘answers to [...] theoretical or epistemic norms’.<sup>152</sup> Raz – whose interpretations of authority and liberty are far from pure<sup>153</sup> – also denies that the

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<sup>150</sup> M. Kramer *In Defense of Legal Positivism: Law without Trimmings* 179.

<sup>151</sup> See S.R. Perry ‘The Varieties of Legal Positivism’ 9 *Canadian Journal of Law and Jurisprudence* (1996) 361, at 361; S.R. Perry ‘Hart’s Methodological Positivism’ 311.

<sup>152</sup> J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 3.

<sup>153</sup> I consider Raz’s moralistic interpretation of authority in the second chapter of this thesis. On his philosophical method for understanding freedom, see J. Raz *The Morality of Freedom* (Oxford: Clarendon Press, 1986) 15-16.

'evaluative considerations' on which his description of law is based are moral.<sup>154</sup>

His apparent rejection of moralistic jurisprudence is endorsed by Dickson, for whom 'Raz's stance exemplifies the correct sort of methodological position for a legal theorist to adopt'.<sup>155</sup>

Yet legal philosophers who portray themselves as pure theorists must specify the non-moral values on which they claim to rely if their methodological assertions are not to be empty. Only by naming such ideals can they disprove the need for a theorist to consult morality when selecting the important aspects of legal practice. With the exception of Dickson – whose critique of the moral-evaluation thesis I discuss below – all of these philosophers identify criteria in terms of which they defend their respective analyses of law. They cite different (albeit overlapping) sets of norms in support of their theories. Rather than discussing the work of each of these philosophers in turn, I simply examine the values mentioned by them. In doing so, I offer my own understanding of the methodology that they claim to practise.

Of the ideals to which they refer – but on the meaning of which they offer surprisingly little – I regard 'clarity',<sup>156</sup> 'consistency',<sup>157</sup> 'comprehensiveness'<sup>158</sup>

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<sup>154</sup> See J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 235.

<sup>155</sup> J. Dickson *Evaluation and Legal Theory* 10.

<sup>156</sup> See M.H. Kramer 'Dogmas and Distortions: Legal Positivism Defended' 688.

and 'coherence'<sup>159</sup> as primary. Whereas clarity requires the elimination of ambiguity from a concept, consistency demands the removal of contradiction. These two norms are distinct: the paradoxical nature of a conception might be obvious and a vague understanding need not be illogical. A description of a practice is comprehensive, meanwhile, insofar as it matches the beliefs of participants and it is coherent to the extent that it forms connections between those beliefs. According to the value of comprehensiveness, an interpretation should fit ordinary language as much as possible (and not only to the degree that separates interpretation from invention).<sup>160</sup> Yet the ideals of clarity, consistency and coherence might require modification of everyday speech. For example, an understanding of a practice whose participants express contradictory beliefs cannot be both wholly comprehensive and entirely consistent. Conflict between the norms of coherence and clarity is possible too, given that integration of the various aspects of a practice might depend on a failure to correct their ambiguity. The goals of coherence and consistency,

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<sup>157</sup> See M.D. Bayles 'What is Jurisprudence About? Theories, Definitions, Concepts or Conceptions of Law' 25; L. Green 'The Concept of Law Revisited' 1713.

<sup>158</sup> See M.D. Bayles 'What is Jurisprudence About? Theories, Definitions, Concepts or Conceptions of Law' 25; M.H. Kramer 'Dogmas and Distortions: Legal Positivism Defended' 688; J. Raz 'Two Views of the Nature of the Theory of Law: A Partial Comparison' 4 *Legal Theory* (1998) 249, at 272.

<sup>159</sup> See J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 3.

<sup>160</sup> Dworkin also distinguishes between these minimal and maximal notions of fit: see R. Dworkin *Law's Empire* 230-231, 255-257.

though, are fully compatible. Since contradiction is detrimental to unity, a coherent understanding of a practice must be consistent. Yet the impossibility of conflict between the norms of coherence and consistency does not imply their equivalence. Although the eradication of paradox is necessary for coherence, it is not sufficient.<sup>161</sup>

Each of the other values mentioned by these legal philosophers either corresponds to one or more of the primary norms or is not a criterion by which a theory can be assessed. The extent to which an understanding of a practice is 'broad'<sup>162</sup> or 'in agreement with facts'<sup>163</sup> depends solely on its respect for the beliefs of participants and, therefore, its comprehensiveness. The ideal of 'precision'<sup>164</sup> – according to which a conception ought not to be vague – is no different from that of clarity. The 'consilience'<sup>165</sup> of various elements of a practice is synonymous with their coherence. Since contradiction, ambiguity and

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<sup>161</sup> The absence of a link between two things – a desire to run a marathon and a preference for the colour blue, say – does not make them contradictory. On the difference between coherence and consistency, see D.N. MacCormick *Legal Reasoning and Legal Theory* 106-107.

<sup>162</sup> See J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 119.

<sup>163</sup> See M.D. Bayles 'What is Jurisprudence About? Theories, Definitions, Concepts or Conceptions of Law' 25.

<sup>164</sup> See M.H. Kramer 'Dogmas and Distortions: Legal Positivism Defended' 688; J. Raz 'Two Views of the Nature of the Theory of Law: A Partial Comparison' 272.

<sup>165</sup> See J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 3.



plurality generate complexity, the oft-cited goal of 'simplicity'<sup>166</sup> – which Kramer calls 'parsimony'<sup>167</sup> – is realised only insofar as a theory is consistent, clear and coherent. An understanding of a practice that displays the virtue of simplicity is also 'elegant'<sup>168</sup> or 'subtle'<sup>169</sup> to the degree that it is comprehensive (and crude inasmuch as it fails to account for the beliefs of participants). Finally, none of 'explanatory power',<sup>170</sup> 'depth of understanding',<sup>171</sup> 'charity'<sup>172</sup> or 'fecundity'<sup>173</sup> is a methodological norm. These qualities result from the application of philosophical standards and are not themselves values on which a description of a practice might be based.<sup>174</sup> The explanatory power of a theory, its depth, its generosity towards those who take part in the practice under scrutiny and its production of interesting hypotheses all depend on the methodological criteria that it ought to satisfy. For example, a moralistic philosopher would not regard

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<sup>166</sup> See M.D. Bayles 'What is Jurisprudence About? Theories, Definitions, Concepts or Conceptions of Law' 25; J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 3, 119; L. Green 'The Concept of Law Revisited' 1713; W.J. Waluchow *Inclusive Legal Positivism* 19.

<sup>167</sup> See M.H. Kramer 'Dogmas and Distortions: Legal Positivism Defended' 688.

<sup>168</sup> See J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 3, 119; M.H. Kramer 'Dogmas and Distortions: Legal Positivism Defended' 688.

<sup>169</sup> See M.H. Kramer 'Dogmas and Distortions: Legal Positivism Defended' 688.

<sup>170</sup> See M.H. Kramer 'Dogmas and Distortions: Legal Positivism Defended' 688.

<sup>171</sup> See J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 119.

<sup>172</sup> See W.J. Waluchow *Inclusive Legal Positivism* 19.

<sup>173</sup> See L. Green 'The Concept of Law Revisited' 1713.

<sup>174</sup> Recall my criticism of Hart's apparent reliance on explanatory power (in the penultimate paragraph of section three) and my rejection of the argument by Bayles and Kramer against theories that reproduce substantive disagreement (in section four).

an understanding of a practice that fails to discriminate between the beliefs of participants on moral grounds as deep.

In my opinion, then, a pure theorist justifies a description of intentional behaviour with reference to the meta-theoretical norms of clarity, consistency, coherence and comprehensiveness. Although moralistic philosophers might also accept these values, a pure theorist is concerned with them alone. A pure interpretation of a practice is based *exclusively* on these meta-theoretical norms.

Julie Dickson, however, objects to this mode of analysis.<sup>175</sup> She denies that reliance on clarity, consistency, coherence and comprehensiveness is a substitute for moralistic interpretation of legal practice. I dismiss her objection and argue that – when combined with her failure to identify other non-moral ideals to which a philosopher of law might refer – her rejection of meta-theoretical norms undermines her critique of the moral-evaluation thesis.

Dickson disputes the need for moralistic interpretation by claiming that a legal theorist can ‘indirectly’ assess law.<sup>176</sup> Whereas direct evaluation of legal practice involves moral appraisal of the beliefs of participants,<sup>177</sup> indirect

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<sup>175</sup> Inexplicably, Brian Bix thinks that she endorses it: see B. Bix ‘Book Review’ 28 *Australian Journal of Legal Philosophy* (2003) 231, at 233.

<sup>176</sup> See J. Dickson *Evaluation and Legal Theory* chapter three.

<sup>177</sup> See J. Dickson *Evaluation and Legal Theory* 51-52.

evaluation merely classifies a particular aspect of law as significant.<sup>178</sup> An assessment of the latter kind need not be moral.<sup>179</sup> Yet on which other standards might such an evaluation of legal practice be based? Dickson denies that meta-theoretical norms are an alternative means of selecting the important elements of law. For her, these values relate solely to the effective communication of a theory: '[T]hey do not bear upon the truth of the particular substantive claims which a given theory makes, but are rather concerned with optimal ways of getting the message of the theory across, and are hence considerations which apply irrespective of what the content of that message might be.'<sup>180</sup>

In rejecting meta-theoretical norms as potential grounds for treating certain features of law as significant, Dickson simply assumes that these values cannot support a theory because they relate to the efficacy of its communication. She offers no reason not to think that meta-theoretical norms might be relevant to both the successful communication and the validity of a theory. Even if she does not say so, perhaps a conviction that these two issues must never to be conflated prompts her to exclude this possibility. But it need not. Since effective communication depends on more than clarity, consistency, coherence and

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<sup>178</sup> See J. Dickson *Evaluation and Legal Theory* 53. For criticism of this distinction, see M.H. Kramer 'Book Review' 211.

<sup>179</sup> See J. Dickson *Evaluation and Legal Theory* 58.

<sup>180</sup> J. Dickson *Evaluation and Legal Theory* 34.

comprehensiveness – a shared language, for instance, is vital – a theory might satisfy meta-theoretical criteria and yet not be communicated successfully. Hence, Dickson's belief that ambiguity, contradiction, plurality and selectivity might impair communication does not preclude reliance on meta-theoretical norms as a substitute for moralistic interpretation.

Indeed, Dickson seems to concede as much when she offers her second argument against the possibility of a legal theory based entirely on these norms. Although not characterised by Dickson as separate, this further argument actually contradicts the first by implying that meta-theoretical criteria might vindicate analyses of some concepts. Whereas the first argument assumes that these values can never justify a theory, the second allows for reliance on them in various non-legal contexts. According to this alternative argument, the impossibility of a legal theory supported only by meta-theoretical norms follows from the distinctive nature of concepts such as law: 'I present [these norms] as insufficient because of the kind of concept that law is, [namely,] a concept people use to understand themselves and their social world.'<sup>181</sup> But Dickson provides no reason to suppose that a philosopher who seeks clarity, consistency, coherence and comprehensiveness must neglect the ways in which people use

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<sup>181</sup> J. Dickson 'Methodology in Jurisprudence: A Critical Survey' 137. See also J. Dickson *Evaluation and Legal Theory* 37, 40-44.

the idea of law to make sense of their lives.<sup>182</sup> If meta-theoretical values alone are often sufficient – as this argument suggests – then Dickson must explain their inadequacy whenever people have opinions about the concept under analysis. Given her failure to do so, her second argument is no more successful than the first.

Moreover, she does not propose any other ideals on which a pure theory of law might be based. Since her distinction between direct and indirect evaluation is contingent on the existence of non-moral values for selecting the important aspects of legal practice, Dickson's rejection of the moral-evaluation thesis is subject to her identification of norms to which a pure theorist can refer in defence of an understanding of law. Rather than specifying these values, however, she merely makes some vague remarks that either beg the question or suggest dependence on norms to which she objects.<sup>183</sup> Whereas her contention that 'the features of the law which are important to explain are those which best reveal the distinctive character of law as a special method of social organisation'<sup>184</sup> is empty – a moralistic philosopher, for example, would explain the distinctive character of law in moral terms – her claim that 'sometimes a

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<sup>182</sup> For a similar point, see B. Leiter *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* 172-175.

<sup>183</sup> For related criticisms, see B. Bix 'Book Review' 236; K.E. Himma 'Book Review' 11 *Law & Politics Book Review* (2001) 567, at 569; M. McBride 'Book Review' 664.

<sup>184</sup> J. Dickson *Evaluation and Legal Theory* 58.

legal theorist may judge that a given feature of the law is important to explain on the basis of the prevalence of certain beliefs concerning that feature on the part of those subject to the law'<sup>185</sup> seems to imply that a description of legal practice ought to fit with the attitudes of participants or, in short, be comprehensive. Dickson's tacit reference to the value of comprehensiveness is, of course, at odds with her dismissal of meta-theoretical norms as potential support for a pure theory of law. In addition, her assertion that 'certain [...] features [of the law] can be adjudged important to explain because they bear upon matters which are of practical concern to us in conducting our lives'<sup>186</sup> contradicts her aversion to teleological reasoning by legal theorists – her 'wishful-thinking' objection indicates her opposition to such arguments<sup>187</sup> – and her declaration that 'one reason why certain features of the law are important to explain is because an understanding of them is vital if we are to be able [...] to subject the law to moral scrutiny'<sup>188</sup> seems no different from the version of the beneficial-moral-consequences thesis that is endorsed by philosophers –

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<sup>185</sup> J. Dickson *Evaluation and Legal Theory* 59.

<sup>186</sup> J. Dickson *Evaluation and Legal Theory* 60.

<sup>187</sup> See J. Dickson *Evaluation and Legal Theory* 89-90.

<sup>188</sup> J. Dickson *Evaluation and Legal Theory* 135.



including MacCormick, Murphy and Schauer<sup>189</sup> – for whom a theory of law might be justified in terms of its positive impact on moral deliberation.

Dickson thus fails to specify non-moral values by which she thinks the significant elements of legal practice might be discerned. And – despite Kenneth Einar Himma's kind suggestion to the contrary<sup>190</sup> – her omission is far from minor: it is fatal to her critique of the need for moralistic jurisprudence. By rejecting meta-theoretical values as reasons for treating certain aspects of legal practice as important and by neglecting to identify other norms on which a pure theory of law might be based, Dickson effectively – and in opposition to her stated aspirations – supports the moral-evaluation thesis. Her failure to offer a non-moral mode of analysis entails the necessity of moralistic interpretation.

Although Dickson's argument against reliance by a theorist on the ideals of clarity, consistency, coherence and comprehensiveness does not succeed, perhaps my alternative to moralistic interpretation is nevertheless flawed because I do not specify a mechanism for resolving conflicts between these values. My failure to indicate their relative significance could prompt such an objection. But conflicts between meta-theoretical norms can be settled in the absence of a hierarchy among them. A philosopher might exercise *judgment*

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<sup>189</sup> See section five.

<sup>190</sup> See K.E. Himma 'Book Review' 569.

whenever they clash. Provided a theory of a practice is sufficiently comprehensive to refute any allegations of invention, judgment can determine the extent to which it should comply with a particular norm. I elaborate on this idea in chapter three and simply mention it as a possibility here.<sup>191</sup>

By examining the non-moral values to which some legal philosophers refer and articulating my version of their methodology, I offer a substitute for moralistic interpretation. According to this alternative mode of analysis, a description of intentional behaviour ought only to be clear, consistent, coherent and comprehensive. Moralistic interpretation is not, therefore, necessary by default. But my description of a philosophical approach that eschews morality is just the first part of my argument against the need for a theorist of a practice to discriminate between the beliefs of participants on moral grounds. I complete my case for the possibility of pure analysis in the next (and final) section of this chapter.

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<sup>191</sup> Dworkin seems to acknowledge this option when he mentions the 'intuitive sense' on which theorists rely to sort out conflicts between methodological norms: see R. Dworkin *Law's Empire* 231. Yet – see 239 – he also employs the images of 'balancing' and 'trading-off' to describe the choice between rival ideals. These metaphors suggest the existence of a common scale on which methodological norms might be compared and thus a hierarchy among them.

## VII

My account of pure interpretation is not sufficient to disprove the need for a philosopher to justify an understanding of a practice in moral terms. To show that moral evaluation of a practice by a theorist is not essential, I must also reject any arguments against the feasibility of this alternative methodology. I consider three.

The first argument derives the necessity of moralistic interpretation from the claim that pure theorists always disagree.<sup>192</sup> It states that philosophical disputes about practices are never settled with reference to meta-theoretical norms alone and that, consequently, pure interpretation is impossible. But this argument is problematic. Both its major premise – that philosophical consensus is a necessary consequence (as opposed to a welcome side-effect) of a theory – and its minor premise – that pure theorists disagree at all times – are (at least) dubious. Given the prevalence of moral discord, moreover, the introduction of morality is not likely to end philosophical debate. Hence, the allegation that pure theorists never agree does not establish the need to supplement meta-theoretical norms with moral criteria.

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<sup>192</sup> For discussion (but not endorsement) of the jurisprudential form of this argument, see J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 173-174.

The second argument for the necessity of moralistic interpretation is based on the perception that pure theorists have no effect on the behaviour that they describe. Whereas the first argument assumes that a philosophical understanding of a practice must change the opinions of other theorists, this reasoning supposes that it must alter the beliefs of its subjects.<sup>193</sup> That these practical consequences are a methodological requirement (or even desirable) is, however, far from obvious. Furthermore, there is no evidence that moralistic theories produce these results, while pure theories do not. The extent to which philosophical reflection modifies a practice depends on the power of a philosopher or philosophers over participants in it.<sup>194</sup> Since a moralistic theorist is no more likely to have practical influence than a pure theorist, the second argument for the necessity of moralistic interpretation also fails.

According to the third argument, pure theorists cannot make sense of practices with moral content. This argument is more limited than the previous two. It does not say that pure interpretation is never possible. Rather, it says merely that philosophers cannot rely exclusively on meta-theoretical norms

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<sup>193</sup> Richard Posner makes the latter assumption about moral philosophy when he derides 'academic moralists' for their alleged failure to reform positive morality: see R.A. Posner *The Problematics of Moral and Legal Theory* chapter one. Insofar as he condemns these theorists for their practical impotence, his critique is rather Marxist, as Brian Leiter notes: B. Leiter 'Book Review: Marxism and the Continuing Irrelevance of Normative Theory' 54 *Stanford Law Review* (2002) 1129, at 1132.

<sup>194</sup> See section two on possible explanations for a specific mode of participation.

when analysing concepts in which morality features. Despite its restricted scope, its success might nevertheless entail the need for moralistic interpretation of the forms of obedience and disobedience that I examine in subsequent chapters. To demonstrate that pure theorists can make sense of practices whose participants' beliefs are (wholly or partly) moral, I discuss the jurisprudential version of this argument.

Many legal philosophers – of whom Ronald Dworkin is the most prominent – attribute the need for moralistic interpretation to the moral character of law.<sup>195</sup> Indeed, Coleman says that this defence of the moral-evaluation thesis 'has nearly risen to the level of conventional wisdom.'<sup>196</sup> Yet its success is contingent on the beliefs of legal actors. Only if they regard law as morally valuable can these philosophers establish the necessity of moralistic jurisprudence. Whether the concept of law has moral value is a preinterpretive matter of fact.

According to Coleman, however, Dworkin ignores this empirical requirement and attempts to fix the morality of legal practice by stipulating that

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<sup>195</sup> For discussion of this argument, see B. Bix 'Conceptual Questions and Jurisprudence' 1 *Legal Theory* (1995) 465, at 473.

<sup>196</sup> J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 174.

the concept of law is concerned with the ideal of legality.<sup>197</sup> Coleman is mistaken – Dworkin does recognise that the beliefs of legal actors determine the moral character of law – yet his error is excusable. It is surely caused by the peculiarity of Dworkin's claim that the concept of law is an *interpretation* of legal practice (as opposed to a preinterpretive fact);

The contrast between concept and conception is [...] a contrast between levels of abstraction at which the interpretation of the practice can be studied. At the first level agreement collects around discrete ideas that are uncontroversially employed in all interpretations; at the second the controversy latent in this abstraction is identified and taken up.<sup>198</sup>

Dworkin's account here of the concept-conception distinction is eccentric. Rather than treating a concept as a preinterpretive fact of which each conception is an interpretation – this is the normal understanding of the difference<sup>199</sup> – Dworkin says that conceptions are 'subinterpretations of a more abstract idea.'<sup>200</sup> He conceives of the concept of law as an interpretive statement of the general ideas that different theories (or subinterpretations) of legal practice share. Elsewhere, he calls the ideal of legality the 'aspirational' concept of law and distinguishes it from the 'doctrinal' concept to which – in my opinion – legal

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<sup>197</sup> See J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 183-185; J. Coleman 'Methodology' 319-321.

<sup>198</sup> R. Dworkin *Law's Empire* 71.

<sup>199</sup> See my discussion in section four of the present chapter.

<sup>200</sup> R. Dworkin *Law's Empire* 71.



philosophers normally refer.<sup>201</sup> As an abstract and uncontroversial interpretation of the latter, the former – of which competing legal theories are conceptions – supposes that the morality of law is a preinterpretive fact. By defining the (aspirational) concept of law in terms of the ideal of legality, then, Dworkin is not attempting to fix the moral character of legal practice. Contrary to Coleman's reading of his case for the necessity of moralistic interpretation, he attributes a moral purpose to law only because he thinks that it fits with the convictions of legal actors.<sup>202</sup>

Yet are their beliefs moral? The answer is not readily apparent. Indeed, W.B. Gallie – for whom disputes about concepts of moral significance are inevitable – implicitly denies the morality of legal practice when he declares that law is not an 'essentially-contested' concept.<sup>203</sup> In any event, the moral nature of law is not sufficient to prove the moral-evaluation thesis. To infer the need for moralistic interpretation from the morality of a practice, one must suppose that the beliefs of participants determine the methodological norms to which a philosopher refers. Dworkin says that 'interpretation takes different forms in different contexts only because different enterprises engage different standards

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<sup>201</sup> See R. Dworkin *Justice in Robes* 2, 5, 12-13.

<sup>202</sup> See R. Dworkin 'A Reply by Ronald Dworkin' 256.

<sup>203</sup> See W.B. Gallie 'Essentially Contested Concepts' in *Philosophy and the Historical Understanding* (2<sup>nd</sup> edition) (New York: Schocken Books, 1968) 190. See also L. Green 'The Political Content of Legal Theory' 17 *Philosophy of the Social Sciences* (1987) 1, at 18-19.

of value or success.<sup>204</sup> But – to repeat my argument from section two – a theorist of a practice need not share the critical-reflective attitude of participants. Interpretation is possible without acceptance of the sort of norms by which participants are motivated. Hence, a philosopher might justify an understanding of a practice whose participants imbue their behaviour with moral value in purely non-moral terms. As Coleman says with regard to jurisprudence:

[A]n analysis of law should help us to understand what we find morally attractive about it, and an analysis that failed to do so would be lacking. But this condition does not imply that we must appeal to moral argument in order to provide an adequate analysis of law. It is sufficient if, at the end of the day, the analysis we offer helps us to understand the morally attractive capacities of law.<sup>205</sup>

Hence, none of the three objections to the possibility of pure interpretation is successful. Neither the belief that pure theorists always disagree, the perception that they have no impact on the conduct about which they write nor the allegation that they are unable to make sense of practices with moral content demonstrates the necessity of moralistic interpretation.

But – despite my rejection of these criticisms – one might still doubt that a philosopher can accept meta-theoretical norms alone. One might protest, for instance, that my argument in this chapter is circular because it depends on the

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<sup>204</sup> R. Dworkin *Law's Empire* 53.

<sup>205</sup> J. Coleman *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 195. See also H.L.A. Hart *The Concept of Law* 244.

very methodology whose feasibility it strives to establish. My response to this objection can be (and, in fact, is) brief.

I do not deny that I rely on the values of clarity, consistency, coherence and comprehensiveness in various sections of the present chapter. My separation of obedience and disobedience from other responses to the law is motivated by these philosophical virtues.<sup>206</sup> I also apply meta-theoretical norms when defining the attitude of acceptance that characterises the internal view of a deliberate action.<sup>207</sup> Finally, my account of pure interpretation itself is prompted by a desire for clarity, consistency, coherence and comprehensiveness.<sup>208</sup>

The charge of circularity is surely provoked by this last instance of pure analysis. That I defend meta-theoretical norms in their own terms does not defeat my argument for the possibility of exclusive reliance on them, however, for the simple reason that a conception of philosophy cannot be other than self-justifying. As Dworkin himself states: '[A] theory of interpretation is an interpretation of the higher-order practice of using interpretive concepts. (So any adequate account of interpretation must hold true of itself.)'<sup>209</sup> To argue for a particular sort of analysis – whether pure or moralistic – one must rely on it.

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<sup>206</sup> See section one. I rely on the importance of comprehensiveness, for example, in rejecting Robert Paul Wolff's version of obedience.

<sup>207</sup> See section two.

<sup>208</sup> See section six.

<sup>209</sup> R. Dworkin *Law's Empire* 49.

Hence, the circularity of my case for the possibility of pure interpretation is unavoidable (and far from unique).

From my description (in the previous section) of a philosophical approach in which morality has no place and my rejection (in the current section) of arguments for the necessity of moralistic interpretation, I conclude that pure interpretation is possible. My two-stage denial of the need for a theorist to cite moral values in support of an understanding of a practice is thus complete. Perhaps one now expects me to make the further claim that pure interpretation is necessary (as well as possible). But I do not believe that a philosopher must (and not only might) rely exclusively on meta-theoretical norms. Just as I can find no argument for the necessity of moralistic interpretation, I am aware of none for the inevitability of pure interpretation. Both modes of analysis are possible and neither is essential.

Moreover, I cannot even think of any arguments for the superiority (as distinct from the possibility, on the one hand, and the necessity, on the other) of pure analysis. Despite my belief that a description of a practice ought to satisfy only meta-theoretical criteria, I cannot justify my preference for this means of comprehension. Every attempt is undermined by its dependence on the very norms whose superiority I seek to vindicate. Suppose I were to argue that pure

interpretation is better than moralistic interpretation because the latter obscures the distinction between the discourses of philosophy and morality. My reasoning would persuade only those for whom the clarity of a practice is more important than its moral enhancement. In other words, I would convince pure theorists and no-one else. Moralistic philosophers would not be troubled by this lack of precision. Indeed, they would cite it in support of moralistic interpretation. But their case also assumes (and does not establish) the superiority of their methodology. They favour moralistic interpretation on moral grounds. Neither moralistic nor pure theorists, then, can justify their respective philosophical beliefs.

The only possible explanations for these preferences are causes other than reasons.<sup>210</sup> The manner in which one practices philosophy might result from one's character, the power of another person or other people and the use of judgment. Although one's preference for a certain style of analysis is not rational, an awareness of its contingency on such facts does not entail its irrationality. The latter conclusion supposes that one's preference is denounced (and not merely unsupported) by reason. Yet – since participation in a practice is prior to reason – condemnation of this sort is impossible. Cohen, therefore,

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<sup>210</sup> This paragraph draws on my discussion in section two of the present chapter.



need not be disturbed by his suspicion that his philosophical approach to certain questions is caused by his decision to study at Oxford University.<sup>211</sup> His awareness of the influence of Oxford dons on his version of philosophy is not a reason against it.

My argument in this chapter – my claim that obedience and disobedience are deliberate responses to legal demands; my consideration of the perspectives from which a theorist can detect and then make sense of these responses; my recognition of three different methods for understanding intentional behaviour; my rejection of philosophy as lexicography; my elaboration of moralistic interpretation; my description of a form of analysis that eschews morality; and my refutation of three arguments for the necessity of moralistic interpretation – establishes the possibility of pure interpretation. But I cannot justify my preference for this methodology. Hence, the only way in which I can demonstrate its superiority is by practising it. In subsequent chapters, I offer pure analyses of some practices of obedience and disobedience. By contrasting my interpretations with those of moralistic theorists, I try to show that one ought to rely exclusively on meta-theoretical norms when justifying a description of a practice. Each of my pure analyses, then, is not only an attempt

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<sup>211</sup> See G.A. Cohen 'Paradoxes of Conviction' 16-19.



## The Possibility of Pure Interpretation

to improve understanding of a specific form of obedience or disobedience. I also propose these descriptions in the hope that they illustrate the superiority of the methodology on which they are based. Since my substantive and methodological claims are mutually dependent, the rest of this thesis is concerned with both.

## Legal Reasons: The Authority of Law

Many people say that the law has authority and must, therefore, be obeyed. Most of them add that the authority of the law is legitimate. In this short chapter, I explore these two statements by examining an influential conception of authority and proposing an alternative to it.<sup>1</sup> The interpretation that I reject is moralistic. It describes the behaviour of those for whom the law has authority in moral terms. It does so by presuming that a philosopher cannot understand the first of the two statements without comprehending the second. It thus connects the meaning of authority to that of legitimacy.

My examination of this theory assumes that these two concepts are not – as some theorists claim<sup>2</sup> – mere rhetorical tools whose function is ideological (in a Marxist sense). Even if they perform this role, I insist that analysis of them is both possible and worthwhile. Moreover, my discussion supposes that the second statement is not tautologous and that an ‘illegitimate authority’ might exist. The object of my scrutiny is not the ‘crude’ thesis that the concepts of

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<sup>1</sup> On the prominence of the conception to which I respond, see J. Waldron *Law and Disagreement* (Oxford: Clarendon Press, 1999) 84.

<sup>2</sup> See W. McBride ‘The Fetishism of Illegality and the Mystifications of “Authority” and “Legitimacy”’ 18 *Georgia Law Review* (1984) 863.

authority and legitimacy are equivalent and so the expression 'legitimate authority' is pleonastic.<sup>3</sup> Rather, I focus on a theory whose connection of the two notions is more complex. I study the moralistic interpretation of authority that Joseph Raz provides.<sup>4</sup> In the first section, I consider his understanding of the relationship between authority and legitimacy. Then – in section two – I look at the conception of legitimate authority on which his interpretation of authority depends. Finally, I sketch a pure alternative to his account according to which obedience to the law by those for whom legal norms are authoritative might (and, I submit, ought to) be understood.

## I

Raz distinguishes between two kinds of authority. He separates that which is legitimate (or *de jure*) from that which is effective (or *de facto*).<sup>5</sup> His recognition of these two types implies his rejection of the 'crude' thesis. He denies that legitimacy and authority are synonymous. Instead, he maintains that legitimate

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<sup>3</sup> See R.A. Shiner *Norm and Nature: The Movements of Legal Thought* (Oxford: Clarendon Press, 1992) 124, at 134-135.

<sup>4</sup> On the moralism of this account, see J. Raz *The Morality of Freedom* (Oxford: Clarendon Press, 1986) 63-64.

<sup>5</sup> See J. Raz *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 4; J. Raz 'Introduction' in J. Raz (ed.) *Authority* (Oxford: Basil Blackwell, 1990) 3; J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Revised edition) (Oxford: Clarendon Press, 1995) 211.

authority is 'primary'.<sup>6</sup> 'One can [...],' he says, 'most clearly discern what authority is by seeing what one acknowledges when acknowledging that a person has legitimate authority.'<sup>7</sup> For him, the notion of effective authority presupposes and cannot be explained without reference to the idea of legitimate authority.<sup>8</sup> Hence, he connects authority and legitimacy without equating them.

Yet Raz seems muddled about the precise association between the two types of authority that he identifies. He offers various formulations of the way in which effective authority relates to legitimate authority and so becomes more than power over people.<sup>9</sup> He often says that it must *claim* to be legitimate.<sup>10</sup> He contradicts this frequent statement, though, when he says that a widespread *belief* in its legitimacy is both necessary and sufficient:

A person has effective or *de facto* authority only if the people over whom he has that authority regard him as a legitimate authority. This would usually, though not necessarily always, imply that he claims legitimate authority for himself. It is enough that others regard him as legitimate authority.<sup>11</sup>

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<sup>6</sup> See J. Raz *The Authority of Law: Essays on Law and Morality* 8.

<sup>7</sup> J. Raz *The Morality of Freedom* 28. See also L. Green *The Authority of the State* (Oxford: Clarendon Press, 1988) 61.

<sup>8</sup> See J. Raz 'On Legitimate Authority' in R. Brunaugh (ed.) *Philosophical Law* (London: Greenwood Press, 1978) 11; J. Raz *The Authority of Law: Essays on Law and Morality* 8-9; J. Raz *The Morality of Freedom* 27.

<sup>9</sup> On the insufficiency of such power for effective authority, see J. Raz *The Authority of Law: Essays on Law and Morality* 9; J. Raz 'Authority and Justification' 14 *Philosophy and Public Affairs* (1985) 3 at 6; J. Raz *The Morality of Freedom* 27-28, 65; J. Raz 'Introduction' 3.

<sup>10</sup> See J. Raz 'Authority and Justification' 6; J. Raz *The Morality of Freedom* 27-28; J. Raz 'Introduction' 3.

<sup>11</sup> J. Raz *The Authority of Law: Essays on Law and Morality* 28.

If Raz thinks that an effective authority need only be generally accepted as legitimate, then he cannot additionally think that it must always profess to be so. These two propositions are mutually exclusive. Both, moreover, are incompatible with his further statement that effectiveness requires *either* a declaration *or* a common perception of legitimacy.<sup>12</sup> This third account of the relationship between *de facto* and *de jure* authority is contrary to the first (inconsistent) couple. It is also in tension with a fourth version. According to the latter, *both* a claim to *and* a general belief in legitimacy are usually necessary for an authority to be effective:

[T]he notion of a *de facto* authority depends on that of a legitimate authority since it implies not only actual power over people but, in the normal case, both that the person exercising that power claims to have legitimate authority and that he is acknowledged to have it by some people. In some unusual cases one is willing to apply the term when only one of these conditions obtains.<sup>13</sup>

Given the distribution of these various formulations throughout Raz's work and his silence on the conflicts between them, I doubt the potential of closer analysis to reveal his actual opinion on the nature of the connection between effectiveness and legitimacy. Hence, I abstain from such exegesis and, instead,

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<sup>12</sup> See J. Raz *The Authority of Law: Essays on Law and Morality* 9; J. Raz 'Authority and Justification' 13-14; J. Raz *The Morality of Freedom* 46; J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 211.

<sup>13</sup> J. Raz *The Morality of Freedom* 65.



turn to his discussion of the connection between the *de facto* and *de jure* senses of the authority the *state*. This species of authority is my ultimate concern in the present chapter and Raz's comments on the association between its effective and legitimate forms are – unlike his corresponding remarks on authority in general – surprisingly consistent. They are, though, nevertheless problematic.

Raz states repeatedly that every legal system claims to be legitimate and so has *de facto* authority.<sup>14</sup> This claim of legitimacy – which need be neither warranted nor sincere – is, he says, 'part of the nature of law'.<sup>15</sup> He regards it as a crucial aspect of every legal practice and denies the possibility of a state that does not make it (and that, therefore, lacks effective authority). Although he also seeks to derive his brand of legal positivism – which he dubs the 'sources thesis' – from this alleged declaration,<sup>16</sup> I express no opinion on its jurisprudential implications here. The claim itself is my topic. More specifically, I ask whether the law must make it.

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<sup>14</sup> See J. Raz *The Authority of Law: Essays on Law and Morality* 30; J. Raz 'Authority and Justification' 5; J. Raz *The Morality of Freedom* 26; J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 215, 357; J. Raz 'Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment' 4 *Legal Theory* (1998) 1, at 3. For a similar view, see R. Alexy 'On Necessary Relations between Law and Morality' 2 *Ratio Juris* (1989) 167.

<sup>15</sup> J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 215. See also J. Raz 'Hart on Moral Rights and Legal Duties' 4 *Oxford Journal of Legal Studies* (1984) 123, at 131.

<sup>16</sup> See J. Raz *The Authority of Law: Essays on Law and Morality* chapter three; J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* chapter ten.



Since legal rules cannot speak – other than metaphorically – on their own behalf, they can assert their legitimacy only if some person or body of persons does so for them. Raz says that legal officials perform this task:

The law's claim to authority is manifested by the fact that legal institutions [...] regard themselves as having the right to impose obligations on their subjects, by their claims that their subjects owe them allegiance, and that their subjects ought to obey the law as it requires to be obeyed (i.e. in all cases except those in which some legal doctrine justifies breach of duty). Even a bad law, is the inevitable official doctrine, should be obeyed for as long as it is in force, while lawful action is taken to try and bring about its amendment or repeal.<sup>17</sup>

Hence, for Raz, a legal system (with effective authority) cannot exist unless its officials maintain – even if they neither correctly nor genuinely believe – that it is legitimate. But does the existence of the law really depend on institutional declarations of its legitimacy? Consider the application by a judge of a legal norm to a particular case. That he or she asserts the legitimacy of his or her decision seems neither essential nor, indeed, probable.<sup>18</sup> He or she might say nothing about the morality of the rule that he or she applies. H.L.A. Hart recognises this possibility:

Of course many judges, when they speak of the subject's legal duties, may believe, as many ordinary citizens may do, in the moral legitimacy of the [law], and may hold that there are moral

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<sup>17</sup> J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 215-216.

<sup>18</sup> For similar point, see R. Dworkin *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006) 199-200.

reasons for complying with it[...] as such, independently of [its] specific content. But I do not agree that [...] judges [must] either believe this or pretend to do so, and I see no compelling reason for accepting an interpretation of 'duty' or 'obligation' that leads to this result. Surely, as far as the facts are concerned, there is a third possibility; that at least where the law is clearly settled and determinate, judges, in speaking of the subject's legal duty, may mean to speak in a technically confined way. They speak as judges, from within a legal institution which they are committed as judges to maintain, in order to draw attention to what by way of action is 'owed' by the subject, that is, may legally be demanded or exacted from him. Judges may combine with this, moral judgment and exhortation especially when they approve of the content of specific laws, but this is not a necessary implication of their statements of the subject's legal duty.<sup>19</sup>

Notwithstanding, then, the actual reason for which a judge applies a legal norm to a specific case – regardless, in other words, of whether the law provides him or her with 'motivational' or mere 'epistemic' guidance<sup>20</sup> – he or she need not aver that his or her decision is legitimate. In fact, the occasions on which he or she appends such a moral statement to his or her application of the law are likely to be rare. Yet judges – even though Raz describes them as 'the authentic representatives, the mouthpiece of the law'<sup>21</sup> – are not the only officials through

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<sup>19</sup> H.L.A. Hart *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982) 266. See also H.L.A. Hart *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 10.

<sup>20</sup> On this distinction – which I discuss in the second section of chapter one – see S. Shapiro 'On Hart's Way Out' in J. Coleman (ed.) *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford: Oxford University Press, 2001) 173-174.

<sup>21</sup> J. Raz 'Hart on Moral Rights and Legal Duties' 131. See also J. Raz *The Authority of Law: Essays on Law and Morality* 30.

whom a legal system communicates. Members of the legislature also speak collectively on its behalf. Perhaps they – and judges insofar as the courts make new (rather than apply existing) rules<sup>22</sup> – must assert that the norms of the system are legitimate. Maybe they do so whenever they change the law.<sup>23</sup>

The proposition that legislators – including ‘activist’ judges – necessarily declare the legitimacy of the rules that they create is, however, false. Although their amendments are inevitably purposive, their objectives need not be moral. They might (and, indeed, frequently do) enact rules for nonmoral – such as economic – reasons. Moreover, their goals necessarily pertain to the substance of the law, whereas principles of legitimacy – about which I say more in the fourth chapter – are *content-independent*. The latter provide moral reasons to obey even unjust norms. Hence, members of the legislature – in common with judicial officers – need not proclaim the legitimacy of the system to which they belong.

Since neither those who devise nor those who apply the law must assert that it is legitimate, Raz is wrong to deny the possibility of a state whose officials fail to pronounce the legitimacy of its norms. His belief that every legal system must claim to be legitimate (and so have effective authority) is false. At least,

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<sup>22</sup> According to Dworkin – see R. Dworkin *Law's Empire* (London: Fontana, 1986) 5-6 – such invention occurs less often than public debate on the topic of ‘fidelity’ supposes.

<sup>23</sup> This suggestion assumes that every law is the product of deliberate enactment (as opposed to, say, custom). Since I reject it, I need not consider the truth of the assumption on which it relies.

though, his remarks on the relationship between the *de facto* and *de jure* forms of state-authority are consistent – unlike his various statements on the way in which authority in general connects to legitimacy. Because each of his formulations of this link conflicts with some or all of the others, his actual opinion is impossible to fathom.

Despite such falsity and muddle, I nevertheless proceed with my examination of the conception of authority that Raz articulates. The problems with his discussion of the way in which effective authority relates to legitimate authority would not exist but for his insistence on the primacy of the latter. This hierarchy is, I submit, the fundamental difficulty with his analysis of authority. In the next section, I explore the version to which he grants priority.

## II

The distinctive feature of an authoritative directive, says Raz, is its 'special peremptory status.'<sup>24</sup> In contrast to a request,<sup>25</sup> an order provides a reason for action that 'is not to be added to all other relevant reasons when assessing what

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<sup>24</sup> J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 212.

<sup>25</sup> On this comparison, see J. Raz 'On Legitimate Authority' 24; J. Raz *The Authority of Law: Essays on Law and Morality* 23.

to do, but should replace some of them.<sup>26</sup> By supplanting a comprehensive evaluation of the behaviour whose performance the authority demands, this reason is 'pre-emptive'.<sup>27</sup> But it is not absolute. Raz does not suppose that authorities must be obeyed 'come what may'.<sup>28</sup> Their commands, he says, are no more than 'exclusionary' reasons, which he defines as 'negative second-order reasons [...] to refrain from acting for a [first-order] reason'.<sup>29</sup> Because these reasons rule out others by type, they may not 'determine what is to be done in certain circumstances but merely [...] what ought to be done on the basis of certain considerations'.<sup>30</sup> They 'may exclude action for all or only for some kinds of reasons'.<sup>31</sup>

According to Raz, then, an order forbids conduct on particular grounds. He does not equate this pre-emption with an absence of thought, however.<sup>32</sup> Since 'what counts [...] is not what the subject thinks but how he acts', then

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<sup>26</sup> J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 214. See also J. Raz 'Authority and Justification' 13-14; J. Raz *The Morality of Freedom* 46.

<sup>27</sup> J. Raz 'Authority and Justification' 10; J. Raz *The Morality of Freedom* 42; J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 213.

<sup>28</sup> J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 213. See also J. Raz 'On Legitimate Authority' 23.

<sup>29</sup> J. Raz *The Authority of Law: Essays on Law and Morality* 17. See also J. Raz 'On Legitimate Authority' 18; J. Raz *Practical Reason and Norms* (2<sup>nd</sup> edition) (Princeton: Princeton University Press, 1990) 39.

<sup>30</sup> J. Raz *The Morality of Freedom* 46.

<sup>31</sup> J. Raz 'On Legitimate Authority' 23. See also J. Raz *The Authority of Law: Essays on Law and Morality* 22-23; J. Raz *Practical Reason and Norms* 40.

<sup>32</sup> Compare Z.K. Bankowski 'Don't Think About It: Legalism and Legality' *Rechtstheorie Beiheft* 15 (Berlin: Duncker & Humblot, 1993) 49.



'[r]eflection on the merits of actions required by authority is not automatically prohibited by any authoritative directive, though possibly it could be prohibited by a special directive to that effect.'<sup>33</sup> Raz thus denies that (academic) criticism of authority is impossible.<sup>34</sup>

He also dismisses Robert Paul Wolff's contention that the peremptory character of a command necessarily precludes its legitimacy. For Wolff, a person cannot recognise an authority without giving up the autonomy on which moral evaluation of it depends.<sup>35</sup> Given this apparent contradiction, Wolff concludes that the notion of *de jure* authority is 'vacuous'.<sup>36</sup> But, says Raz, this paradox exists only 'if one conceives of all reasons as essentially first-order reasons and overlooks the possibility of the existence of second-order reasons.'<sup>37</sup> Hence, he insists that '[t]he question of the legitimacy of authority takes the form that it was always assumed to take: an examination of the grounds that justify in certain circumstances regarding some utterances of certain persons as exclusionary reasons.'<sup>38</sup> What are these grounds? Raz specifies two.

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<sup>33</sup> J. Raz 'Authority and Justification' 7; J. Raz *The Morality of Freedom* 39.

<sup>34</sup> See J. Raz 'On Legitimate Authority' 25; J. Raz *The Authority of Law: Essays on Law and Morality* 24-25; J. Raz 'Authority and Justification' 10; J. Raz *The Morality of Freedom* 42; J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 213.

<sup>35</sup> See R.P. Wolff *In Defense of Anarchism* (Berkeley, California: University of California Press, 1998) chapter one.

<sup>36</sup> R.P. Wolff *In Defense of Anarchism* 19.

<sup>37</sup> J. Raz *The Authority of Law: Essays on Law and Morality* 27.

<sup>38</sup> J. Raz *The Authority of Law: Essays on Law and Morality* 27.



The first – which he labels the ‘dependence’ thesis – maintains that ‘[a]ll authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives and which bear on the circumstances covered by the directives.’<sup>39</sup> An order, says Raz, is a ‘dependent’ reason as well as a pre-emptive one.<sup>40</sup> He depicts it as ‘a reason for action which replaces the reasons on the basis of which [the authority] was meant to decide.’<sup>41</sup> Yet he does not claim that it must *actually* be derived from the considerations that it supersedes:

[T]he [dependence] thesis is not that authoritative determinations are binding only if they correctly reflect the reasons on which they depend. On the contrary, there is no point in having authorities unless their determinations are binding even if mistaken (though some mistakes may disqualify them). The whole point and purpose of authorities[...] is to preempt individual judgment on the merits, and this will not be achieved if in order to establish whether the authoritative determination is binding individuals have to rely on their own judgment of the merits.<sup>42</sup>

The second ground of legitimacy is also consistent with (at least some) erroneous commands. It states that ‘[t]he normal and primary way to establish that a person should be acknowledged to have authority over another person

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<sup>39</sup> J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 214. See also J. Raz ‘Justification and Authority’ 14; J. Raz *The Morality of Freedom* 47.

<sup>40</sup> See J. Raz ‘Authority and Justification’ 9; J. Raz *The Morality of Freedom* 41; J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 212.

<sup>41</sup> J. Raz ‘Authority and Justification’ 10; J. Raz *The Morality of Freedom* 42; J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 213.

<sup>42</sup> J. Raz ‘Authority and Justification’ 15; J. Raz *The Morality of Freedom* 47-48.

involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly.<sup>43</sup> According to this 'normal-justification' thesis, the legitimacy of an authority typically depends on whether its application of the first-order reasons from which its instructions should be derived is likely to be superior to that of its subjects. Raz thus identifies an ability to 'improve conformity with reason' as the principal determinant of legitimacy.<sup>44</sup> Since '[p]eople differ in their knowledge, skills, strength of character and understanding', however, he believes that states generally lack this capacity and so are illegitimate.<sup>45</sup> '[B]ecause of the bureaucratic necessity to generalize and disregard distinctions too fine for large-scale enforcement and administration,' he says, 'some people are able to do better if they refuse to acknowledge the authority of [the] law.'<sup>46</sup>

For Raz, therefore, an authority cannot be legitimate and its directives cannot operate as exclusionary reasons unless it satisfies the requirements of

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<sup>43</sup> J. Raz 'Authority and Justification' 18-19; J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 214. For a formulation that is almost (but not entirely) identical, see J. Raz *The Morality of Freedom* 53.

<sup>44</sup> J. Raz *The Morality of Freedom* 74.

<sup>45</sup> J. Raz *The Morality of Freedom* 77-78. See also J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 216.

<sup>46</sup> J. Raz *The Morality of Freedom* 78.

both the dependence and normal-justification theses. In tandem, he says, 'the two theses present a comprehensive view of the nature and role of legitimate authority.'<sup>47</sup> His summary of this view elucidates the connections between the various aspects of his analysis – including the pre-emption thesis –and so merits quotation in full:

[The dependence and normal-justification theses] articulate what I shall call the service conception of authority. They regard authorities as *mediating* between people and the right reasons which apply to them, so that the authority judges and pronounces what they ought to do according to right reason. The people for their part take their cue from the authority whose pronouncements replace for them the force of the dependent reasons. This last implication of the service conception is made explicit in the pre-emption thesis. The mediating role of authority cannot be carried out if its subjects do not guide their actions by its instructions instead of by the reasons on which they are supposed to depend. No blind obedience to authority is here implied. Acceptance of authority has to be justified, and this normally means meeting the conditions set in the justification thesis. This brings into play the dependent reasons, for only if the authority's compliance with them is likely to be better than that of its subjects is its claim to legitimacy justified. At the level of general justification the pre-empted reasons have an important role to play. But once that level has been passed and we are concerned with particular action, dependent reasons are replaced by authoritative directives. To count both as independent reasons is to be guilty of double counting.<sup>48</sup>

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<sup>47</sup> J. Raz *The Morality of Freedom* 55-56.

<sup>48</sup> J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 214-215.

This, then, is the conception of legitimate authority to which Raz grants priority and in whose terms he portrays authority that is merely effective. It is a theory that offers a moral explanation – via the dependence and normal-justification theses – for the peremptory character of orders. Yet is it convincing?

Heidi Hurd does not think so. She regards it as contradictory. In her opinion, the normal-justification thesis conflicts with the pre-emption thesis. The former, she says, necessitates reliance on the very reasons that the latter excludes. She supposes that one cannot gauge the ability of an authority to boost compliance with first-order reasons unless 'at each decision, one judges for oneself the reasons for action, and compares one's judgment with that reached by the authority.'<sup>49</sup> Since this continuous assessment is at odds with the exclusionary character for which it seeks to account, Hurd dismisses the interpretation of authority that Raz advances.

But the premise of this (somewhat predictable<sup>50</sup>) objection is false. The normal-justification thesis does not require evaluation of every directive that an authority issues. Instead, it bases legitimacy on – to use Raz's expression – 'reasoned trust'.<sup>51</sup> The assessment of relative expertise (or 'theoretical' authority) for which it calls is – like a patient's judgment about the competence of a doctor

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<sup>49</sup> H.M. Hurd 'Challenging Authority' 100 *Yale Law Journal* (1991) 1611, at 1633.

<sup>50</sup> On its inevitability, see H.M. Hurd 'Challenging Authority' 1633.

<sup>51</sup> J. Raz *Practical Reason and Norms* 193.

– an inference from limited knowledge (and thus partly a matter of faith) rather than – as Hurd assumes – the product of incessant comparison. Given the rather speculative – though far from whimsical – nature of the determination on which it depends, it is wholly compatible with the pre-emption thesis for which Raz claims that it provides support.

Although Hurd's charge of contradiction fails, I submit that the service conception nevertheless deviates from two of the other meta-theoretical ideals to which I express my commitment in chapter one. By imposing moral constraints on the pre-emption thesis, Raz flouts the values of clarity and comprehensiveness. The limits that he places on exclusionary reasons are both imprecise and at odds with everyday understandings of authority. My pure critique of his moralistic theory brings the present section to a close.

Raz seeks to capture the preemptory nature of authority in the pre-emption thesis, which states that an order replaces 'some' of the reasons from which it is – following the dependence thesis – meant to be derived. But which first-order reasons does it supplant? What is the scale of its exclusion? If – as Raz contends – pre-emption is contingent on legitimacy, then it cannot – despite his

remarks to the contrary<sup>52</sup> – take the place of *all* other reasons: it must at least permit action on the considerations that relate to its own justification.

For Raz, relative expertise is the primary rationale for attributing exclusionary force to the instructions of an authority. But he does not suppose that the normal-justification thesis is the sole determinant of legitimacy. Among other pertinent factors, he says, are reasons *against* treating authoritative directives as pre-emptive.<sup>53</sup> These reasons also limit the range of an order's exclusion. Raz, though, is somewhat vague as to their identity and emphasises that they differ from case to case.<sup>54</sup> Nevertheless, he identifies two considerations that he thinks are often relevant. The first is the existence of 'another person or institution with a better claim to be recognized as an authority' and the second is 'the intrinsic desirability of people conducting their own life by their own lights.'<sup>55</sup>

He regards certain injustices as reasons against pre-emption too. Although he denies that every unjust directive is beyond the scope of exclusion

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<sup>52</sup> See J. Raz 'On Legitimate Authority' 23; J. Raz *Practical Reason and Norms* 40.

<sup>53</sup> See J. Raz *The Morality of Freedom* 56; J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 214.

<sup>54</sup> See J. Raz 'Authority and Justification' 14; J. Raz *The Morality of Freedom* 46; J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 214.

<sup>55</sup> J. Raz *The Morality of Freedom* 57. On the latter, see also J. Raz 'Authority and Justification' 29; J. Raz *The Morality of Freedom* 69; J. Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 365-366.



– if it were, he says, ‘the advantage gained by accepting the authority as a more reliable and successful guide to right reason would disappear’<sup>56</sup> – he maintains that ‘some immoralities may be of a kind that no [person] has authority to commit.’<sup>57</sup> He describes the moral principles that these acts violate as ‘general limits’ to authority.<sup>58</sup> Yet what are these restrictions? Cursory references to ‘individual liberty’<sup>59</sup> and ‘fundamental human rights’<sup>60</sup> aside, he omits to say. He cannot, moreover, resolve this ambiguity by asserting that jurisdictional – as opposed to pre-empted – injustices are ‘clear’.<sup>61</sup> His mere declaration that they are obvious is not sufficient to make them so.

Because the moral constraints that Raz places on the exclusionary force of commands are imprecise, he fails to articulate a clear account of the peremptoriness that he considers the distinctive feature of authority. Yet this lack of clarity is not the only problem with his moralistic interpretation: it also deviates from conventional wisdom. In particular, it does not tally with the common belief that peremptory instructions are *absolute*.<sup>62</sup> By claiming that

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<sup>56</sup> J. Raz ‘Authority and Justification’ 25; J. Raz *The Morality of Freedom* 61.

<sup>57</sup> J. Raz *The Morality of Freedom* 79.

<sup>58</sup> J. Raz *The Morality of Freedom* 79.

<sup>59</sup> J. Raz *The Morality of Freedom* 80.

<sup>60</sup> J. Raz ‘Authority and Justification’ 14; J. Raz *The Morality of Freedom* 46.

<sup>61</sup> J. Raz ‘Authority and Justification’ 26; J. Raz *The Morality of Freedom* 62.

<sup>62</sup> For evidence of this belief, see *Oxford English Dictionary Online* <<http://dictionary.oed.com>>.

orders are merely exclusive of some (because they are contingent on other) reasons, Raz departs from the way in which authoritative directives are normally understood. The moral conditions that he imposes on commands are at odds with the finality that people generally ascribe to them.

His dismissal of popular opinion is apparent from his critique of Wolff. According to the latter, orders *are* conclusive. They require, says Wolff, 'doing what [someone] tells you to do *because he tells you to do it*.'<sup>63</sup> In this sense, they are doubly pre-emptive: they rule out practical consideration of their legitimacy as well as their substance.<sup>64</sup> Wolff thus follows Thomas Hobbes, for whom a command exists 'where a man saith, *Doe this*, or *Doe not this*, without expecting other reason than the Will of him that sayes it.'<sup>65</sup> Hart agrees with Hobbes too:

[A] commander's expression of will [...] is not intended to function within the hearer's deliberations as a reason for doing the act, not even as the strongest or dominant reason, for that would presuppose that independent deliberation was to go on, whereas the commander intends to cut off or exclude it. This I think is precisely what is meant by speaking of a command as 'requiring' action and calling a command a 'peremptory' form of address.<sup>66</sup>

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<sup>63</sup> R.P. Wolff *In Defense of Anarchism* 9.

<sup>64</sup> On such double pre-emption, see P. Soper 'Legal Theory and the Claim of Authority' 18 *Philosophy & Public Affairs* (1989) 209, at 216-217.

<sup>65</sup> T. Hobbes *Leviathan* (Edited with an introduction by C.B. MacPherson) (London: Penguin, 1985) 303.

<sup>66</sup> H.L.A. Hart *Essays on Bentham: Studies in Jurisprudence and Political Theory* 253.

By defining orders as compatible with practical consideration of neither their legitimacy nor their content, these philosophers offer an interpretation of authority that better corresponds with everyday views than Raz's service conception. Whereas they conceive of authority as absolute, he insists on its moral limits and so disregards the ordinary meaning of peremptoriness. When added to the imprecision of the conditions that he imposes on exclusionary reasons, this lack of correspondence furnishes pure theorists with a second ground on which to oppose his subordination of authority to legitimacy. For them, his moralistic theory is deficient in both clarity and comprehensiveness. In the final section, therefore, I sketch a pure alternative to it. I believe that this account provides a clear explanation for the sense of absoluteness that Raz neglects.

### III

Authority, I suggest, is a matter of *acceptance*.<sup>67</sup> It depends on an actor's belief that rules of a particular type include the ultimate justification for behaviour. These norms are authoritative. By providing the actor with motivational – as opposed to mere epistemic – guidance, they exclude conduct on *all* (and not

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<sup>67</sup> The following remarks draw on (and suppose familiarity with) the account of acceptance that I present in the second section of chapter one.

merely some) other grounds. Since the decisive reason for action is among them, the scope of their pre-emption is – *pace* Raz – unlimited. These norms are also commands if they express the will of a person or persons other than the actor. Hence, the peremptoriness of orders is due to their membership of a set of rules that is the object of acceptance.

This alternative understanding captures the finality with which authority is generally associated. Moreover, it elucidates the ‘peculiar feeling of unease’ that Raz regards as a probable effect of conflict between authoritative norms and those that they exclude.<sup>68</sup> It relates this anxiety to the sense of absurdity that is liable to follow from the realisation that such pre-emption cannot be rationalised.<sup>69</sup> It is thus more comprehensive than the service conception, which neither fits with the common belief that authority is conclusive nor accounts for the disquiet that Raz observes.

Although the authoritative status – which is unlikely to be permanent – of certain rules is not susceptible to justification, their exclusionary force might be explained non-rationally. The temperament of the actor, the power of another person or other people and the exercise of judgment are all possible causes of

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<sup>68</sup> J. Raz *Practical Reason and Norms* 41. For discussion, see W.A. Edmundson ‘Rethinking Exclusionary Reasons: A Second Edition of Joseph Raz’s *Practical Reason and Norms*’ 12 *Law and Philosophy* (1993) 329, at 333-336.

<sup>69</sup> On this feeling of absurdity, see T. Nagel ‘The Absurd’ in *Mortal Questions* (Cambridge: Cambridge University Press, 1979).

acceptance. Whether individually or jointly, these facts might occasion the authority of a particular order of norms. They might, for instance, explain someone's attribution of authority to the law.

Legal norms are authoritative whenever – which may not be often – they include the decisive reason for action. Hence, the law itself motivates obedience to it by a person for whom it has authority. He or she treats a legal obligation as the ultimate justification for his or her behaviour and so complies with the law for its own sake. Were the motivation for his or her obedience of any other kind, he or she would ascribe authority to non-legal norms instead. To be consistent with state-authority, then, judgments of legitimacy cannot be more than hypothetical. Reliance on them implies participation in moral practice and precludes the authority of the law.

From the incompatibility of legal authority with actual – as opposed to virtual – engagement in moral discourse, Wolff thinks that anarchism results.<sup>70</sup> Yet someone for whom the law is authoritative need not deny the legitimacy of the state. Whether he or she does is determined by his or her reflection – as distinct from action – on relevant principles of morality. A declaration of illegitimacy is no less dependent on consideration of these values than a claim

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<sup>70</sup> See R.P. Wolff *In Defense of Anarchism* 19.

that the law is legitimate. Both require the application of ideals whose practical – but not academic – significance the authority of the law negates. I examine some of these principles in chapter four. They supply content-independent reasons for obedience and disobedience to the law. Before looking at them, however, I try – in the next chapter – to make sense of moral values that justify obedience and disobedience to the law on account of its substance.



### 3

## Moral Reasons I: Justice

In the previous chapter, I tried to make sense of obedience to the law that results from a belief in its authority by suggesting an alternative to Raz's moralistic reading of such conduct. According to my pure analysis, the law has authority insofar as it provides motivational guidance to its subjects. I define authority in terms of acceptance: the set of rules to which the decisive justification for an action belongs is authoritative. Hence, the law has authority for a man whose refusal to commit an assault is ultimately motivated by the legal prohibition on the use of actual or the threat of imminent physical force. Were the critical reason for his restraint of another kind – were he primarily concerned to avoid punishment, for example – then the law would, for him, lack authority.

This alternative conception precludes a rational explanation for the authority of a particular set of rules. Hence, someone for whom the law (currently<sup>1</sup>) has authority must regard questions about the morality of a legal demand as no more than hypothetical. Although this person might ask whether

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<sup>1</sup> Since constant participation in a single practice is unnecessary (and improbable) – see chapter one – a person might (and is likely to) treat various sorts of rules as authoritative over time.

his or her fulfilment of a legal duty is morally justified, only hermeneutic observation of moral practice and an answer without practical implications can follow. Yet not every moral assessment of the law lacks categorical force: the ultimate justification for deliberate compliance with or violation of a primary rule is often moral.<sup>2</sup> Many (and probably all<sup>3</sup>) people are (at least sometimes<sup>4</sup>) inspired by morality to obey or disobey the law. For them, moral norms (frequently, if not always) have authority and the guidance that the legal system provides is merely epistemic. Their behaviour (on these occasions) is my topic in this and the next chapter.

To understand such responses to the law, a philosopher – regardless of the methodology on which he or she relies – must make sense of the values that moral actors cite in defence of their obedience and disobedience to legal demands. The justifications that these ideals provide are of two sorts: a moral reason for satisfying or breaching a legal obligation is either dependent on or independent of the substance of the obligation.<sup>5</sup>

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<sup>2</sup> I discuss the distinction between primary and secondary rules (and the impossibility of obedience or disobedience to the latter) in the first section of chapter one.

<sup>3</sup> On the implausibility of a life that is wholly amoral, see B. Williams 'The Amoralist' in *Morality* (Canto edition) (Cambridge: Cambridge University Press, 1993).

<sup>4</sup> Constant acceptance of moral norms is no more likely than their complete rejection: see section two of chapter one.

<sup>5</sup> Many theorists deny that obedience extends to compliance with the law for a content-dependent moral reason. For them, a moral justification for obedience to the law must be content-independent: see, for example, A.J. Simmons 'The Duty to Obey and Our Natural Moral

The existence of a reason of the former type is determined exclusively by moral evaluation of the specific action whose performance the law requires. This is normally a matter of justice. If the action is consonant with a principle of justice, there is a content-dependent reason to comply with the legal rule that prescribes it. If the action is contrary to such a principle, though, there is a reason of the same kind not to do so. Moreover, the value of compassion – which is known as mercy when it requires a departure from justice – sometimes furnishes a moral agent – whether male or female<sup>6</sup> – with a content-dependent reason to adhere to or infringe a primary rule. Obedience is warranted by the substance of a legal norm if the deed that it enjoins its subjects to perform happens to be compassionate, whereas a content-dependent reason for disobedience exists if conduct that the law forbids has this quality. Justice, however, is the typical source of these moral reasons – hence the title of the present chapter, which focuses on them.

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Duties’ in C.H. Wellman & A.J. Simmons *Is There a Duty to Obey the Law?* (Cambridge: Cambridge University Press, 2005) 95. Yet these theorists – see 190-191 of Simmons’s paper – do not place a similar restriction on the meaning of disobedience. Since neither the value of comprehensiveness nor any other meta-theoretical norm requires the asymmetry on which they insist, I reject it.

<sup>6</sup> Although Carol Gilligan associates the ‘ethic of care’ with women, she admits that the correlation is not absolute: see C. Gilligan *In a Different Voice: Psychological Theory and Women’s Development* (Cambridge, Mass.: Harvard University Press, 1982) 2.

I examine moral reasons that belong to the second category in the next chapter. The existence of a reason of this type is contingent on moral appraisal of something other than the action on which the law insists. It depends, I suggest, on the moral significance of either the simple fact that the law requires the action or, instead, the process from which the legal duty results. I explore both of these options in chapter four. I argue that contemplation of whether the mere existence of a legal demand – as distinct from its content or its genesis – affords a moral reason to comply with it is equivalent to reflection on the issue of ‘political obligation’. My chief concern, therefore, is the very nature of such an obligation. In contrast, my discussion of the procedural explanation that moral agents often give for their obedience to the law is more specific: I ask whether the supposedly ‘democratic’ creation of a primary rule generates a moral reason to act in accordance with it.

My immediate objective, however, is to make sense of the moral values that supply content-dependent reasons for obedience and disobedience to the law. My understanding of these ideals is contingent on the general theory of morality to which I subscribe. Many philosophers endorse an account of moral practice called ‘value-monism’. They hold that one value or a small group of

compatible values is the origin of all others.<sup>7</sup> I delineate their theory in the opening section of this chapter. Then – in the second section – I outline Isaiah Berlin's rejection of it. Berlin denies the existence of a sovereign value or values from which the rest are derived. He advocates 'value-pluralism'.

Ronald Dworkin claims that Berlin's alternative to value-monism lacks philosophical support. According to Dworkin, a theory of morality must be moralistic. He insists on a moral explanation for the meaning of each value and dismisses value-pluralism for failing to meet this requirement (or, more precisely, a modified version of it). Yet he ignores pure interpretation as a means by which Berlin (or, indeed, any philosopher) might defend value-pluralism. In section three, I argue that Berlin's account of moral discourse satisfies the meta-theoretical standards of clarity, consistency, comprehensiveness and coherence and, therefore, that methodological arguments exist for both descriptions of morality.

Given my commitment to pure interpretation, I obviously think that value-pluralism is a better theory of moral practice and thus the proper source of content-dependent reasons for obedience and disobedience to the law. Yet one might protest that it is often unable to solve conflicts between moral ideals

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<sup>7</sup> Given the second option, the label 'value-monism' might seem inappropriate. I comment on this apparent misnomer in the next section.

in the absence of an ultimate value or values from which the rest originate. Notwithstanding my recognition of both the need for a means of settling these clashes and the failure of value-pluralism to specify a reliable method for doing so, I dismiss this objection. It is based on the false premise that the solution to every moral problem must be entirely theoretical. In section four, I present another way of dealing with conflicts between moral ideals. Then – in the final section – I further clarify value-pluralism by reflecting on the popular opinion that it entails liberalism.

## **I**

An understanding of the values that provide moral agents with content-dependent reasons to obey and disobey the law follows from an overall description of morality. A common position in moral philosophy is value-monism, which I examine in the current section. My objective here is limited: I aim merely to introduce the principal elements of this theory. Only later – in section three – do I consider (methodological) arguments for and against it.

Philosophical descriptions of moral practice often depict one or a restricted and coherent set of the values on which participants rely as the origin



of all others.<sup>8</sup> Perhaps the most prominent example of this stance is utilitarianism, which looks upon utility – whether calculated in terms of pleasure-maximisation or preference-satisfaction – as the supreme value from which every other results.<sup>9</sup> But utilitarianism is not the sole brand of value-monism. Alternative versions include that espoused by Ronald Dworkin, for whom the two principles of ‘ethical individualism’ – namely, ‘equal importance’ and ‘special responsibility’ – are primary.<sup>10</sup> Although Dworkin rejects the supremacy of utility, he agrees with utilitarians (and others) about the general structure of morality.

I say much more about Dworkin’s theory in section three. An immediate explanation of its classification as a species of value-monism is necessary, however, given that it assigns sovereignty to more than one value. To characterise Dworkin’s account of morality as ‘monistic’ might seem odd. Yet the compatibility of the two values that constitute ethical individualism justifies

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<sup>8</sup> On this phenomenon, see C. Larmore *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987) 10.

<sup>9</sup> For a classical statement of utilitarianism, see J. Bentham *An Introduction to the Principles of Morals and Legislation* (Edited by J.H. Burns & H.L.A. Hart) (London: Athlone Press, 1970).

<sup>10</sup> See R. Dworkin ‘Do Liberty and Equality Conflict?’ in P. Barker (ed.) *Living as Equals* (New York: Oxford University Press, 1996) 42-43; R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass.: Harvard University Press, 2000) 5-7. Dworkin also refers to these norms (individually) as the principle of ‘intrinsic value’ and the principle of ‘personal responsibility’ and (collectively) as the ‘dimensions of human dignity’: see R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press, 2006) chapter one.

the application of this epithet to his theory. By 'acting in concert',<sup>11</sup> these values function as one. Their equivalence to a single ideal accounts for Dworkin's status as a value-monist.

From my initial description of value-monism, one might infer that its proponents doubt the reality of the ideals that they deem subordinate. Yet they do not dispute the existence of these values. Their theories of moral practice acknowledge the many values to which participants refer. Nevertheless, value-monists ascribe mere *instrumental* worth to all but a sovereign value or – as in Dworkin's case – values. Utilitarians, for instance, claim that utility alone is desirable for its own sake and that the remaining values – liberty, equality and so on – are desirable only for the sake of utility.<sup>12</sup> Value-monists thus recognise numerous ideals, but attribute intrinsic worth to almost none of them.

Due to their belief in a value or values to which each of the rest is simply a means, these theorists offer a solution to every moral problem. They hold that all moral behaviour is ultimately – even if not directly – justified by this value or

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<sup>11</sup> R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 6. See also R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 11.

<sup>12</sup> See, for example, John Stuart Mill's analysis of justice: J.S. Mill 'Utilitarianism' in *On Liberty and Other Essays* (Edited with an Introduction and Notes by John Gray) (Oxford: Oxford University Press, 1991) chapter V.

these values. For value-monists, then, no moral dilemma is real.<sup>13</sup> They treat ostensible conflicts between values as no more than evidence of a failure to grasp the instrumental nature of all but a sovereign value or values. A genuine clash is impossible between a value and another or others from which it originates. Moreover, the common source from which secondary values allegedly derive permits their comparison whenever they require inconsistent actions. Their purported homogeneity renders them commensurable and allows for a rational choice between them.

Hence, value-monists assert the compatibility of every moral ideal. This harmony follows from their contention that a single value or a small bunch of congruent values is the source of the rest. Yet the unity that these theorists perceive is not universally acknowledged. Indeed, Isaiah Berlin regards it as 'demonstrably false'.<sup>14</sup> His rejection of value-monism is my topic in the next section.

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<sup>13</sup> On the prevalence of this view, see C.W. Gowans 'Introduction: The Debate on Moral Dilemmas' in C.W. Gowans (ed.) *Moral Dilemmas* (Oxford: Oxford University Press, 1987) 4.

<sup>14</sup> I. Berlin 'Two Concepts of Liberty' in *Liberty* (Edited by H. Hardy, with an essay on Berlin and his critics by I. Harris) (Oxford: Oxford University Press, 2002) 214.

## II

According to Berlin, moral ideals are often incompatible. Whereas value-monists dismiss such conflicts as merely apparent, Berlin insists on their authenticity. He states:

I cannot conceive of any world in which certain values can be reconciled. I believe, in other words, that some of the ultimate values by which men live cannot be reconciled or combined, not just for practical reasons, but in principle, conceptually. Nobody can be both a careful planner, and, at the same time, wholly spontaneous. You cannot combine full liberty with full equality – full liberty for the wolves cannot be combined with full liberty for the sheep. Justice and mercy, knowledge and happiness can collide. If that is true, then the idea of a perfect solution of human problems – of how to live – cannot be coherently conceived. It is not that such a perfect harmony cannot be created, because of practical difficulties, the very idea of it is conceptually incoherent. Utopian solutions are in principle incoherent and unimaginable. Such solutions want to combine the uncombinable.<sup>15</sup>

Berlin denies that practical obstacles – which presumably include limited time and deficient knowledge – cause genuine clashes between moral ideals. To the extent that congruence is a theoretical (even if not an immediate) option, real conflict is absent. Instead, says Berlin, the frequent incompatibility of values is

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<sup>15</sup> I. Berlin in R. Jahanbegloo *Conversations with Isaiah Berlin* (London: Phoenix Press, 2000) 142.

due to the nature of morality. More specifically, he thinks that the impossibility of 'perfect harmony' follows from value-pluralism.<sup>16</sup>

This theory of moral practice entails regular conflict between the values that participants accept. It is, therefore, distinct from (but nevertheless consistent with) the 'reasonable pluralism' that John Rawls discusses in his later work.<sup>17</sup> Whereas value-pluralists speak of tensions between moral *ideals*, Rawls is concerned with disputes between moral *agents*. Reasonable pluralism, for Rawls, means a diversity of moral opinions. In contrast, Berlin's pluralism is a theory of the values from which these assorted views develop. Were such dissensus an inevitable consequence of Berlin's version of morality, then the two forms of pluralism would, of course, not be separate. Yet an account of moral practice – namely, value-pluralism – to which many participants do not subscribe obviously cannot be an explanation for disagreement between them. Whatever causes their disputes, it is not value-pluralism. So – despite George Crowder's claim to the contrary<sup>18</sup> – the two types of pluralism are distinct.

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<sup>16</sup> For discussion, see J. Gray *Post-liberalism: Studies in Political Thought* (London: Routledge, 1993) 67; S. Morgenbesser & J. Lieberman 'Isaiah Berlin' in E. & A. Margalit (eds) *Isaiah Berlin: A Celebration* (London: The Hogarth Press, 1991) 6; B. Parekh *Contemporary Political Thinkers* (Oxford: Martin Robertson, 1982) 35; B. Williams 'Introduction' in I. Berlin *Concepts and Categories: Philosophical Essays* (Edited by H. Hardy, with an introduction by B. Williams) (London: Pimlico, 1999) xviii.

<sup>17</sup> The principal text is J. Rawls *Political Liberalism* (New York: Columbia University Press, 1996).

<sup>18</sup> See G. Crowder *Liberalism and Value Pluralism* (London: Continuum, 2002) 165-171.

Berlin's theory can also be differentiated from relativism. That values often clash does not mean that they exist only within particular (and not across all) cultures. Indeed, Berlin insists on the universality of some ideals.<sup>19</sup> But one can separate value-pluralism and relativism without rejecting the latter. To make this distinction, one might simply note that value-pluralism is consistent with both universalism and relativism.<sup>20</sup> One need not choose between these possibilities. My refusal to do so in this thesis – I cannot hope to make a satisfactory contribution to the debate between relativists and universalists here – is indicated by the absence of both the definite and the indefinite article whenever I use the expression 'moral practice'.

If value-pluralism implies neither moral disagreement nor relativism, then what *does* it signify? How does it explain the collisions between moral ideals in which its proponents believe? Value-pluralists allege not only that morality consists of numerous values – this opinion is consistent with value-monism – but also that a large number of values have inherent worth.<sup>21</sup> The distinctive claim of value-pluralists is that various ideals are intrinsically

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<sup>19</sup> For an excellent summary of Berlin's (often imprecise) views on this topic, see G. Crowder *Isaiah Berlin: Liberty and Pluralism* (Cambridge: Polity Press, 2004) 19-20, 116-123, 132-134. See also G. Crowder *Liberalism and Value Pluralism* 3-4, 45-46; S. Lukes *Liberals & Cannibals: The Implications of Diversity* (London: Verso, 2003) 100-106.

<sup>20</sup> One might say the same about value-monism. The values that such a theory combines might be either peculiar to a specific culture or common to all cultures.

<sup>21</sup> See G. Crowder *Liberalism and Value Pluralism* 48-49.



desirable. While value-monists place no more than one or a few of the values to which moral agents refer in this category, theorists such as Berlin hold that many values are ends-in-themselves.<sup>22</sup> Insofar as some of the ideals to which value-pluralists attribute intrinsic worth actually share the same name, moreover, their total number is even greater than one might initially suppose.<sup>23</sup> But it is fewer than the sum of all moral ideals. Value-pluralists need not regard every value as ultimate and, in fact, classify several as purely instrumental.

Crucially, no rational comparison is possible between values whose worth is intrinsic. Such appraisal requires a 'covering' value in terms of which their relative significance might be explained.<sup>24</sup> But the necessary homogeneity cannot exist between values that are ends-in-themselves. Since the worth of these ideals is not conditional on the degree to which they meet a further standard, they are incommensurable. The absence of a common value by which to assess them entails that none can be better than or equal to any other.<sup>25</sup>

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<sup>22</sup> See, for instance, I. Berlin in S. Lukes 'Isaiah Berlin: In Conversation with Steven Lukes' 120 *Salmagundi* (1998) 52, at 101.

<sup>23</sup> According to Berlin, for instance, at least two such values are called 'liberty': see I. Berlin 'Two Concepts of Liberty'.

<sup>24</sup> See R. Chang 'Introduction' in R. Chang (ed.) *Incommensurability, Incompatibility and Practical Reason* (Cambridge, Mass.: Harvard University Press, 1997).

<sup>25</sup> On incommensurability as incomparability, see J. Raz *The Morality of Freedom* (Oxford: Clarendon Press, 1986) 335-345. See also J. Gray *Berlin* (London: Fontana, 1995) 49-53; J. Gray *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (London: Routledge, 1995) 69-70; S. Lukes *Liberals & Cannibals: The Implications of Diversity* 63-64.

This incomparability accounts for the persistent conflict between moral ideals that value-pluralists describe. The authenticity of these clashes follows from the incommensurability of the values involved.<sup>26</sup> No covering value can resolve the incompatibility of values that are desirable in themselves. Berlin thus dismisses the possibility of reconciliation between, for example, liberty and equality. By ascribing intrinsic worth to both of these values, he denies that a third value might prevent genuine conflict between them.

Yet value-pluralists do not suppose that all values collide. In fact, Berlin notes that '[a] good many values are perfectly compatible'.<sup>27</sup> Conflict obviously cannot exist between an instrumental value and its source. Moreover, some ultimate values might always fit together. Notwithstanding their incommensurability, they may never actually be at odds with one another. Were they to clash, however, their inherent worth would ensure the authenticity of the conflict between them. Finally, collisions between instrumental values with a common origin are merely apparent. For secondary values really to clash, they must be means to different and contradictory ends. Their incompatibility is parasitic on (and, therefore, might be translated into) friction between the incommensurable values from which they derive.

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<sup>26</sup> See C.W. Gowans 'Introduction: The Debate on Moral Dilemmas' 29.

<sup>27</sup> I. Berlin in S. Lukes 'Isaiah Berlin: In Conversation with Steven Lukes' 101. See also C.W. Gowans 'Introduction: The Debate on Moral Dilemmas' 13.

To the extent that moral ideals conflict, they might do so in two distinct ways. The incompatibility of some values may be absolute. These values can never be realised simultaneously. According to Onora O'Neill, clashes of this kind are 'intrinsic'.<sup>28</sup> Alternatively, conflict between values might be limited to specific circumstances. O'Neill calls tension of this sort 'contingent'.<sup>29</sup> It is, she says, 'the stuff of life and literature: telling the truth will sometimes (but not always) injure somebody; rescuing somebody from danger can sometimes (as in Kant's example, but not always) require a lie.'<sup>30</sup> Although dependent on particular circumstances, conflict of this type – including that between equality and liberty – is still due to the incomparability of the values involved. Its cause is theoretical, not practical. Whether intrinsic or contingent, the incompatibility of values always results from their incommensurability.

Such incomparability means that loss is a necessary consequence of both species of conflict. A 'trade-off' is impossible between two values whose worth is inherent: more of one cannot compensate for less of another. Instead, one of

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<sup>28</sup> See O. O'Neill *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge: Cambridge University Press, 1996) 158-159; O. O'Neill *Bounds of Justice* (Cambridge: Cambridge University Press, 2000) 59.

<sup>29</sup> See O. O'Neill *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* 159; O. O'Neill *Bounds of Justice* 59.

<sup>30</sup> O. O'Neill *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* 159.

these values must be 'sacrificed' if they clash.<sup>31</sup> It must be relinquished (rather than exchanged) for the other. Berlin recognises that both of these values cannot be preserved and that the unavoidable loss of one might even (but need not<sup>32</sup>) be tragic:

Liberty and equality, spontaneity and security, happiness and knowledge, mercy and justice – all these are ultimate human values, sought for themselves alone; yet when they are incompatible, they cannot all be attained, choices must be made, sometimes tragic losses accepted in the pursuit of some preferred ultimate end.<sup>33</sup>

Berlin, then, denies the possibility of moral unity. He holds that many (and not merely one or a few) of the values on which moral agents rely are ends-in-themselves. The incommensurability of these ultimate ideals explains his belief in the authenticity of clashes between them. His value-pluralism thus contradicts an account of morality to which many philosophers subscribe. In the next section, I consider Dworkin's response.

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<sup>31</sup> On the metaphors of 'trade-off' and 'sacrifice', see S. Lukes *Liberals & Cannibals: The Implications of Diversity* 66-67.

<sup>32</sup> I say more about the contingency (as opposed to the inevitability) of such tragedy in section four.

<sup>33</sup> I. Berlin 'My Intellectual Path' in *The First and the Last* (London: Granta Books, 1999) 77.

### III

According to Dworkin, value-pluralists fail to justify their understanding of morality. They cannot, he says, simply assume that values conflict: to do so 'begs the question'.<sup>34</sup> He warns them against 'any lazy conclusion' about the character of moral practice and declares that they 'must do the work' on which their theory depends.<sup>35</sup> More precisely, he claims that they must provide a moral explanation for the meaning of each value. Since they do not meet this requirement (or, rather, a modified version of it), he concludes that their critique of value-monism lacks philosophical support.

Although Dworkin is correct about the need for justification, he is wrong to conclude that none other than moralistic interpretation is available. In this section, I point out that he ignores the option of pure interpretation and suggest that this alternative methodology actually supports value-pluralism. My argument is in three parts. I start by examining Dworkin's case for value-monism. I then contemplate a methodological puzzle that he and all like-minded theorists must solve. Finally, I present value-pluralism as a pure interpretation of moral practice.

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<sup>34</sup> R. Dworkin *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006) 113.

<sup>35</sup> R. Dworkin 'Do Values Conflict? A Hedgehog's Approach' 43 *Arizona Law Review* (2001) 251, at 259.

Dworkin asks how a value-pluralist might account for conflict between moral ideals. Given the persistent lack of consensus about the meaning of these values, he denies that the language of moral actors – whether historical or contemporary – can be decisive.<sup>36</sup> Hence, he dismisses lexicography as a method on which a value-pluralist might rely and stresses the need for a critical theory of morality.<sup>37</sup> Moreover, he rejects the possibility – which he rightly calls ‘nonsense’ – that scientific analysis of moral values reveals their essence.<sup>38</sup> Instead, he insists on interpretation of a different sort. He believes that the meaning of a moral value is necessarily a moral issue.<sup>39</sup> To make sense of such an ideal, he says, a philosopher must ‘understand what is good about it.’<sup>40</sup> Hence, value-pluralists ‘must confront the difficult question of how to identify a value’s value.’<sup>41</sup>

Does Berlin engage in analysis of this sort? His methodology is not obvious – as Crowder remarks, ‘he nowhere provides any extended defence of

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<sup>36</sup> See R. Dworkin ‘Do Values Conflict? A Hedgehog’s Approach’ 254-255; R. Dworkin *Justice in Robes* 113-114, 150-152, 153-154.

<sup>37</sup> On the need for interpretation and the idea of critical morality, see section four of chapter one.

<sup>38</sup> R. Dworkin *Justice in Robes* 152-153. See also R. Dworkin ‘Do Liberty and Equality Conflict?’ 41; R. Dworkin ‘Do Values Conflict? A Hedgehog’s Approach’ 255; R. Dworkin *Justice in Robes* 113.

<sup>39</sup> See, for example, R. Dworkin *Justice in Robes* 113.

<sup>40</sup> R. Dworkin ‘Do Values Conflict? A Hedgehog’s Approach’ 255. See also R. Dworkin ‘Do Liberty and Equality Conflict?’ 40.

<sup>41</sup> R. Dworkin *Justice in Robes* 156.



pluralism's truth'<sup>42</sup> – but one might think that he practises a consequentialist form of moralistic interpretation when he contends that a value-pluralist is less likely than a value-monist to bring about tyranny.<sup>43</sup> Then again, he might simply regard this alleged effect as an incidental benefit of (as distinct from a justification for) his moral theory. Besides – as Steven Lukes observes<sup>44</sup> – Berlin offers no reason to associate a belief in value-monism more closely with this political outcome. He does not establish a necessary connection between the tyrannical inclinations of the value-monists to whom he refers and the type of moral theory that they endorse. In addition, he says nothing about the terrible conclusions with which value-pluralism is arguably consistent. According to Dworkin, a value-pluralist might tolerate extreme poverty due to a perceived conflict between its eradication and the liberty of the rich.<sup>45</sup> Even if Berlin employs moralistic interpretation, then, he does so unconvincingly.

Dworkin does not make sense of moral values by investigating their practical consequences. Rather, he purports to explain each of them in terms of at least one other. Take, for instance, the value of liberty. Dworkin defines it as

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<sup>42</sup> G. Crowder *Isaiah Berlin: Liberty and Pluralism* 131.

<sup>43</sup> See, for example, I. Berlin 'Two Concepts of Liberty' 212.

<sup>44</sup> See S. Lukes in 'Discussion: Hedgehogs and Foxes' in M. Lilla, R. Dworkin & R. Silvers (eds) *The Legacy of Isaiah Berlin* (New York: New York Review Books, 2001) 61. See also G. Crowder *Isaiah Berlin: Liberty and Pluralism* 129-130.

<sup>45</sup> See R. Dworkin 'Do Values Conflict? A Hedgehog's Approach' 259; R. Dworkin *Justice in Robes* 106.

'freedom to spend your own rightful resources or deal with your own rightful property in whatever way seems best to you.'<sup>46</sup> By construing liberty with reference to moral entitlements, Dworkin merges it with his theory of material equality, which gauges sameness according to people's resources (as opposed to, say, their welfare or their opportunities).<sup>47</sup> He regards liberty as an 'aspect' of this version of equality.<sup>48</sup> Yet he also thinks that the latter is 'sensitive' to the former.<sup>49</sup> In his opinion, liberty and equality are 'interconnected'.<sup>50</sup> Moreover, he combines both of them with the rest of the ideals of which political morality consists. He provides 'interpretations of each of these values that reinforce the others – a conception of democracy, for example, that serves equality and liberty, and conceptions of each of these other values that serves democracy so understood.'<sup>51</sup> Dworkin thus portrays the ideals of political morality 'in the light of each other.'<sup>52</sup>

<sup>46</sup> R. Dworkin *Justice in Robes* 112. See also R. Dworkin 'Do Liberty and Equality Conflict?' 53; R. Dworkin 'Do Values Conflict? A Hedgehog's Approach' 254; R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 69-70.

<sup>47</sup> For an extended statement of this theory, see R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality*.

<sup>48</sup> R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 121.

<sup>49</sup> R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 122.

<sup>50</sup> R. Dworkin in 'Discussion: Pluralism' in M. Lilla, R. Dworkin & R. Silvers (eds) *The Legacy of Isaiah Berlin* (New York: New York Review Books, 2001) 135.

<sup>51</sup> R. Dworkin *Justice in Robes* 161. See also R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 4; R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 134.

<sup>52</sup> R. Dworkin in 'Discussion: Pluralism' 135.

How does he explain such unity? He justifies his account of these values (and their compatibility) with reference to a further notion of equality. More specifically, he obtains the meaning of each of them from the principle that government ought to display the same concern for every citizen. He claims that equality of this type is 'the sovereign virtue of political community'.<sup>53</sup> Dworkin elevates equal concern above the other ideals of political morality and relies on it to support his understanding of them. Just as he declares that the value of legality is the function of law and the moral criterion by which the success of a legal theory must be determined,<sup>54</sup> so he holds that equal concern is the purpose of political morality – 'without it government is only tyranny'<sup>55</sup> – and the essential justification for a political theory. On the assumption that competing analyses of a political ideal fit sufficiently with the existing convictions of moral actors – an interpretation must not be 'artificial or alien'<sup>56</sup> – then Dworkin discriminates between them according to the value of equal concern. He looks upon different conceptions of material equality, for example, as 'rival answers to the question of what system of property would meet that standard.'<sup>57</sup> He also

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<sup>53</sup> R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 1.

<sup>54</sup> For discussion, see section five of chapter one.

<sup>55</sup> R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 1.

<sup>56</sup> R. Dworkin *Justice in Robes* 162. See also R. Dworkin 'Do Liberty and Equality Conflict?' 41-42; R. Dworkin in 'Discussion: Pluralism' 135; R. Dworkin *Justice in Robes* 114.

<sup>57</sup> R. Dworkin *Law's Empire* (London: Fontana, 1986) 296.

uses the norm of equal concern to assess proposed definitions of liberty.<sup>58</sup> Hence, Dworkin defends his account of political morality (and dismisses alternative theories, including utilitarianism<sup>59</sup>) by appealing to 'the abstract responsibility [of government] to treat each citizen's fate as equally important.'<sup>60</sup>

If a philosopher cannot describe a moral ideal without reference to at least one other, then Dworkin must specify the value or values on which his understanding of equal concern depends. He complies with this (self-imposed) requirement by situating his political theory within 'a general moral outlook' that he calls 'ethical individualism'.<sup>61</sup> In doing so, he 'connects the political structure not only to morality more generally but to ethics as well.'<sup>62</sup> He thus rejects the division in Rawls's later work between 'political' and 'comprehensive' theories of morality.<sup>63</sup>

'Ethical individualism' comprises the principles of 'equal importance' and 'special responsibility'. The first of these precepts declares that 'it is

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<sup>58</sup> See, for instance, R. Dworkin *Justice in Robes* 114-115.

<sup>59</sup> See R. Dworkin *Taking Rights Seriously* (New Impression with a Reply to Critics) (London: Duckworth, 1978) 275; R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 11.

<sup>60</sup> R. Dworkin *Law's Empire* 296.

<sup>61</sup> R. Dworkin 'Do Liberty and Equality Conflict?' 42. See also R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 4.

<sup>62</sup> R. Dworkin *Justice in Robes* 161.

<sup>63</sup> See R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 4-5; R. Dworkin *Justice in Robes* 161; R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 63-66. On this distinction, see J. Rawls *Political Liberalism*.

important, from an objective point of view, that human lives be successful rather than wasted, and this is equally important, from that objective point of view, for each human life.<sup>64</sup> The second principle qualifies the first: '[T]hough we must all recognize the equal objective importance of the success of a human life, one person has a special and final responsibility for that success – the person whose life it is.'<sup>65</sup> Dworkin acquires the import of equal concern from 'these two principles acting in concert.'<sup>66</sup> He states:

The first principle requires government to adopt laws and policies that insure that its citizens' fates are, so far as government can achieve this, insensitive to who they otherwise are – their economic backgrounds, gender, race, or particular sets of skills and handicaps. The second principle demands that government work, again, so far as it can achieve this, to make their fates sensitive to the choices they have made.<sup>67</sup>

Dworkin's political theory is 'shaped by these twin demands.'<sup>68</sup> He thinks that they combine to give meaning to equal concern and so to every other political ideal (given his subordination of the latter to the former). Hence, he seeks 'an interpretation of liberty and equality that shows that these ideals respect and

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<sup>64</sup> R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 5. See also R. Dworkin 'Do Liberty and Equality Conflict?' 42; R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 9-10.

<sup>65</sup> R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 5. See also R. Dworkin 'Do Liberty and Equality Conflict?' 43; R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 10.

<sup>66</sup> R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 6. See also R. Dworkin 'Do Liberty and Equality Conflict?' 44.

<sup>67</sup> R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 6.

<sup>68</sup> R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 7.

enforce the two principles of ethical individualism'.<sup>69</sup> According to Dworkin, only his account of liberty and equality passes this test. Berlin's description of these values, he says, does not: 'Liberty and equality, properly understood as protecting the principles of ethical individualism, are not conflicting ideals.'<sup>70</sup> Indeed, Dworkin's reliance on the norms of equal importance and special responsibility leads him to accuse value-pluralists of transforming liberty and equality from goods into evils.<sup>71</sup>

Dworkin, then, makes sense of political morality with reference to the ideal of equal concern, whose definition he attains from the complementary requirements of ethical individualism. But whence does he derive his reading of the principles of equal importance and special responsibility? His belief in the need to explain every moral ideal in terms of at least one other obliges him to specify the value or values from which they emanate. Their apparent status as the ultimate moral norms, however, precludes such analysis. To avoid an infinite regress, Dworkin must qualify his stated methodology and exempt the tenets of ethical individualism from the moralistic interpretation to which he subjects every other value. The need to locate these principles beyond moral

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<sup>69</sup> R. Dworkin 'Do Liberty and Equality Conflict?' 42.

<sup>70</sup> R. Dworkin 'Do Liberty and Equality Conflict?' 57-58.

<sup>71</sup> See R. Dworkin 'Do Liberty and Equality Conflict?' 41; R. Dworkin 'Do Values Conflict? A Hedgehog's Approach' 255-256; R. Dworkin *Justice in Robes* 115-116.



appraisal requires him to supply an alternative rationale for them. But he fails to indicate the non-moral support on which his defence of value-monism rests. Given this deficiency, I now review some ways in which he might explain the moral values that he regards as sovereign. My consideration of these possibilities is not only relevant to Dworkin's theory: every form of value-monism depends on a solution to the methodological puzzle of how to justify the value or values of which the others are supposedly mere aspects.

Since the hierarchy that value-monists propose cannot be deduced from any moral norm – as both Jeremy Bentham and John Stuart Mill realise<sup>72</sup> – then perhaps it can be established by *induction*. According to Mill, the primacy of utility is implied by the psychological fact that people want only to be happy.<sup>73</sup> From his claim that happiness is the sole aspiration of every human being, he infers that utility is the supreme value from which all others originate. But Mill's reasoning is problematic. Even if one accepts its logic – and many do not – its factual basis is at least doubtful.

Although distinct, a natural-law explanation for the sovereignty of a value or values is no more promising. In contrast to Mill's empirical argument, a

<sup>72</sup> They acknowledge that no moral reason can be given for the prior status of utility: see J. Bentham *An Introduction to the Principles of Morals and Legislation* chapter I, paragraph 11; J.S. Mill 'Utilitarianism' chapters I, IV.

<sup>73</sup> See J.S. Mill 'Utilitarianism' chapter IV. For discussion, see R. Crisp *Mill on Utilitarianism* (London: Routledge, 1997) chapter four.

natural lawyer declares that the structure of morality is embedded in the fabric of the universe. Yet this metaphysical (and somewhat mystical) proposition is no more compelling than the premise on which Mill relies.

Due to the implausibility of these two explanations, a value-monist might instead argue that the supremacy of a value or values fits with pervasive (even if merely implicit) beliefs about morality. In other words, he or she might regard the opinions of moral actors (rather than psychology or natural law) as proof that a specific value or a limited combination of values ranks above all others. One might think that Dworkin takes this approach when he asserts that the principles of equal importance and special responsibility 'are very widely accepted in contemporary humanist societies'.<sup>74</sup> Yet he never purports to justify these norms in terms of the agreement on them that he perceives. Instead, he maintains only that such apparent unity provides a 'common ground' from which political disputes ought to start.<sup>75</sup> His discussion of the extent to which people believe in the principles of ethical individualism is motivated exclusively by his distress at the current state of American politics and his desire to 'find shared principles of sufficient substance to make a national political debate

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<sup>74</sup> R. Dworkin 'Do Liberty and Equality Conflict?' 42.

<sup>75</sup> See R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* chapter one.

possible and profitable.<sup>76</sup> Nowhere does he suggest that these principles are actually justified by the consensus that he depicts.

Even though Dworkin does not practise this method of explanation, another value-monist might do so. Moreover, he or she might illustrate the moral agreement on which it depends by telling a story. Reference to fictional circumstances is a common tactic among moral philosophers for whom a value or a small number of values is prior to every other. Because such hierarchy is consistent with the intrinsic worth of non-sovereign ideals – as John Rawls recognises, a solution to the ‘priority problem’ need not be ‘single-principled’<sup>77</sup> – these philosophers might reject value-monism. In addition, their story-telling strategy can be employed by other theorists whose aims are less ambitious than a comprehensive understanding of morality.

Robert Nozick, for instance, devises a scenario involving Wilt Chamberlain, a famous basketball player, in support of his elevation of a particular conception of freedom over other political ideals.<sup>78</sup> Unlike value-

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<sup>76</sup> R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 6.

<sup>77</sup> See J. Rawls *A Theory of Justice* (Revised edition) (Oxford: Oxford University Press, 1999) 36-40. I say more about his theory below.

<sup>78</sup> He also appeals to the notion of self-ownership, but I need not consider this aspect of his case for libertarianism here. For discussion of it, see G.A. Cohen *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995) chapter three; A.H. Goldman ‘The Entitlement Theory of Distributive Justice’ 73 *Journal of Philosophy* (1976) 823; W. Kymlicka *Contemporary Political Philosophy: An Introduction* (2<sup>nd</sup> edition) (Oxford: Oxford University Press,

monists – whose interest is morality as a whole – Nozick is concerned merely with the political elements of moral discourse. Yet the sort of defence that he provides for his libertarianism might also be offered by moral theorists – including value-monists – for whom a value or values is prior to all (and not only some) of the rest. I thus consider this method of explanation by looking at his use of it.

Nozick begins by asking his reader to imagine a society in which the distribution of property is – according to his reader's definition – just. He calls this allocation  $D_1$ . He then states:

Now suppose that Wilt Chamberlain is greatly in demand by basketball teams, being a great gate attraction. (Also suppose contracts run only for a year, with players being free agents.) He signs the following sort of contract with a team: In each home game, twenty-five cents from the price of each ticket of admission goes to him. (We ignore the question of whether he is 'gouging' the owners, letting them look out for themselves.) The season starts, and people cheerfully attend his team's games; they buy their tickets, each time dropping a separate twenty-five cents of their admission price into a special box with Chamberlain's name on it. They are excited about seeing him play; it is worth the total admission price to them. Let us suppose that in one season one million persons attend his home games, and Wilt Chamberlain winds up with \$250,000, a much larger sum than the average income and larger even than anyone else has. Is he entitled to this income? Is this new distribution  $D_2$ , unjust?<sup>79</sup>

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2002) 107-127; M. Neumann 'Side Constraint Morality' 12 *Canadian Journal of Philosophy* (1982) 131.

<sup>79</sup> R. Nozick *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974) 161.

Nozick's response to the first question is positive and his answer to the second is negative. To conclude otherwise, he says, would be to endorse 'continuous interference with people's lives'.<sup>80</sup> He holds that any attempt to prevent D<sub>2</sub> (by banning payments to Chamberlain) or to restore D<sub>1</sub> (by taxing Chamberlain) would be contrary to individual freedom. Liberty, for Nozick, includes the right to use one's property as one wishes. By subordinating every other political ideal to this conception of freedom, he concludes that D<sub>2</sub> is just.

Nozick thinks that the elevation of this ideal is consistent with widespread (even if not explicit) moral convictions. His story about Wilt Chamberlain appeals to these alleged beliefs. It is not itself an argument for the priority of absolute property-rights over other political values, but merely an illustration of the opinions that Nozick attributes to moral actors. By telling it, he hopes to prompt recognition of these supposed convictions. His anecdote is – to borrow Daniel Dennett's expression – an 'intuition pump'.<sup>81</sup>

Hence, Nozick's argument depends on the accuracy with which he characterises political morality. Yet numerous moral actors do not hold the beliefs that he ascribes to them. They reject the primacy of absolute property-rights. Their reasons for doing so are various: some agree that liberty is

<sup>80</sup> See R. Nozick *Anarchy, State, and Utopia* 163.

<sup>81</sup> See D.C. Dennett 'The Milk of Human Intentionality' 3 *Behavioral and Brain Sciences* (1980) 428-430.

supreme, but disagree with Nozick's understanding of it; some – egalitarians, for instance – give priority to a different value altogether; and some – arguably most – think that no value takes precedence over the rest of political morality. Nozick disregards this complexity. He misrepresents the opinions from which he purports to infer the justice of D<sub>2</sub>. Such distortion – which Bernard Williams calls 'an enormous exaggeration of at best one aspect of our moral ideas'<sup>82</sup> – results in the failure of Nozick's argument.

The moral discord whose existence Nozick ignores also defeats any attempt to demonstrate the priority of a value or values over all (and not merely some) others simply by pointing to the convictions of moral actors. The obvious fact of moral disagreement means that a value-monist must seek to prove this hierarchy by alternative means. John Rawls suggests yet another way in which he or she might do so. Although Rawls rejects value-monism – he does not regard every subordinate ideal as merely instrumental – and is concerned only with justice – in contrast to value-monists, he does not articulate a comprehensive theory of morality – he nevertheless proposes a method for ranking moral ideals that a value-monist might adopt.

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<sup>82</sup> B. Williams 'The Minimal State' in J. Paul (ed.) *Reading Nozick: Essays on 'Anarchy, State, and Utopia'* (Oxford: Basil Blackwell, 1982) 34.



Like Nozick, Rawls bases his approach on familiar convictions about justice. Unlike Nozick, however, Rawls does not regard his theory of justice as a straightforward deduction from these beliefs. He knows that his theory does not fit perfectly with such opinions – he recognises their variety – and makes the different claim that it is in ‘reflective equilibrium’ with them.<sup>83</sup> To achieve this balance, Rawls both modifies his theory and rejects some of the convictions from which he starts. He ‘work[s] from both ends.’<sup>84</sup> By doing so, he arrives at ‘principles of justice which match our considered judgments duly pruned and adjusted.’<sup>85</sup>

In an attempt to make this outcome ‘vivid’,<sup>86</sup> Rawls asks his reader to envisage the rational response of someone in an ‘original position’ that models these revised judgments.<sup>87</sup> He maintains that such an individual would choose two principles of justice and would arrange them in ‘lexical order’.<sup>88</sup> According to Rawls, a person in the original position would put the first principle (which gives everyone the same fundamental liberties) before the second (which is

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<sup>83</sup> See J. Rawls *A Theory of Justice* 17-19, 42-45; J. Rawls *Political Liberalism* 8, 28, 45, 384n; J. Rawls *Justice as Fairness: A Restatement* (Cambridge, Mass.: Harvard University Press, 2001) 29-31.

<sup>84</sup> J. Rawls *A Theory of Justice* 18.

<sup>85</sup> J. Rawls *A Theory of Justice* 18.

<sup>86</sup> J. Rawls *A Theory of Justice* 16.

<sup>87</sup> For an introduction to this hypothetical situation, see J. Rawls *A Theory of Justice* 10-19.

<sup>88</sup> On the nature of lexical order, see J. Rawls *A Theory of Justice* 37-38.

concerned with social and economic inequalities) and would also regard one element of the second principle (which regulates access to offices and positions) as prior to the other (whose subject is the distribution of wealth).<sup>89</sup>

Rawls insists that this hierarchy results from his search for reflective equilibrium between his theory and widespread convictions about justice. Although he does not regard the first principle as the source of every other moral ideal, value-monists might nevertheless implement his approach in their pursuit of a value or a blend of values that generates the rest of morality. Indeed, Rawls's method is the most promising way of arguing for the supremacy of one or a limited combination of the ideals on which moral actors rely. While I am sceptical that Dworkin and other value-monists can employ it successfully – see my remarks in the next section – its apparent potential means that they have no choice but to do so when seeking to vindicate their contention that a value or an amalgamation of values is the origin of all others.<sup>90</sup>

With this recognition of the need for Dworkin to attain reflective equilibrium between the norms of ethical individualism and the opinions of moral actors, my elucidation of his case for value-monism is finally complete.

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<sup>89</sup> For a summary of these principles and the relationship between them, see J. Rawls *A Theory of Justice* 266.

<sup>90</sup> Dworkin practises this method elsewhere – see, for example, R. Dworkin *Law's Empire* 424, note 17 – but he must use it here too.

His argument – notwithstanding its ultimate dependence on Rawls's method – is moralistic. By analysing moral practice in terms of the sovereign principles of equal importance and special responsibility, Dworkin denies the existence of conflict between the values that participants accept. His interpretation of their convictions with reference to the complementary requirements of ethical individualism generates a hierarchical theory that supplies an answer to every moral question. He thus claims that moralistic analysis fails to endorse value-pluralism. When combined with his belief in the necessity of this methodology, the conclusion that Berlin's alternative to value-monism lacks philosophical support inevitably follows.

If a theory of morality must be moralistic, then Dworkin is surely correct to dismiss value-pluralism. But the condition on which his rejection depends is false: a moral philosopher need not practise moralistic interpretation. Having rightly dispensed with both lexicography and scientific analysis as means by which a description of morality can be explained, Dworkin is wrong to think that moralistic interpretation is the sole remaining option. He ignores pure interpretation as another way in which a philosopher might defend an account of moral practice.

In chapter one, I established the possibility of this alternative methodology. My argument had two stages. First, I specified four non-moral criteria to which a pure theorist refers when selecting the important aspects of a practice: clarity, consistency, comprehensiveness and coherence. Second, I countered some attacks on the feasibility of exclusive reliance by a philosopher on these meta-theoretical norms. In doing so, I disproved the need for moralistic interpretation of any practice – even one with moral content.

So a pure theory of morality is possible and Dworkin cannot dismiss value-pluralism simply because of its manifest lack of success as a moralistic interpretation. Of course, one cannot assume that it instead satisfies the standards of clarity, consistency, comprehensiveness and coherence. That a philosopher might explain an account of morality on these non-moral grounds does not imply that value-pluralism actually receives support from them. Hence, I now consider whether a pure analysis of moral practice denies the compatibility of all values.

One might infer that Berlin rejects this methodology when he renounces 'neutral conceptual analysis' and stresses the 'anti-marxist' implications of his value-pluralism.<sup>91</sup> But a description of morality whose justification is non-moral

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<sup>91</sup> See S. Lukes 'Isaiah Berlin: In Conversation with Steven Lukes' 92-93.

might nevertheless be controversial. To suppose otherwise is to repeat the error that Dworkin commits in deriding external theorists for their alleged inability to contribute to non-philosophical debates.<sup>92</sup> In fact, Berlin occasionally alludes to meta-theoretical norms. He seems to invoke the value of comprehensiveness when he points to the 'ordinary experience' of moral dilemmas.<sup>93</sup> Moreover, he appears to cite the value of clarity as a reason for his understanding of 'the essence of the notion of liberty'.<sup>94</sup> Despite these ostensible references to meta-theoretical criteria, however, his case for value-pluralism is – like H.L.A. Hart's defence of legal positivism<sup>95</sup> – ambiguous. Whether Berlin relies on these norms alone or appeals to them as part of an unsuccessful moralistic interpretation – recall his speculative comments on the tyrannical inclinations of value-monists – is not evident. Given this uncertainty, he fails to provide sufficient evidence that a pure interpretation of morality endorses value-pluralism.

Yet the fact that Berlin does not seem to base his moral theory exclusively on the norms of clarity, consistency, comprehensiveness and coherence does not preclude such support for value-pluralism. Indeed, I think that a philosopher

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<sup>92</sup> See chapter one, section two.

<sup>93</sup> I. Berlin 'Two Concepts of Liberty' 213-214. See also I. Berlin 'The Pursuit of the Ideal' in *The Proper Study of Mankind: An Anthology of Essays* (Edited by H. Hardy & R. Hausheer, with a foreword by N. Annan and an introduction by R. Hausheer) (London: Pimlico, 1998) 11.

<sup>94</sup> I. Berlin 'Two Concepts of Liberty' 204.

<sup>95</sup> See chapter one, section three.

whose understanding of morality complies solely with these meta-theoretical criteria ought to deny that a single value or small bunch of congruent values is the source of the rest.

A pure theorist should regard value-monism as insufficiently comprehensive, for instance, due to its rejection of the dilemmas that many (and perhaps all) moral actors sometimes endure. Only value-pluralism respects this prominent feature of moral practice, as George Crowder indicates: 'It fits with salient aspects of modern moral experience, in particular with our sense of the multiplicity of genuine values, and of the distinctness of those values which is highlighted by those cases where we have to choose among them.'<sup>96</sup>

A value-monist might (and Dworkin definitely would) respond that a philosopher must analyse (and cannot merely record) these apparent dilemmas. Yet comprehensiveness is not the sole ambition of a pure theorist: he or she also strives for clarity, consistency and coherence. I submit that value-pluralism – notwithstanding differences between particular versions of it – satisfies these criteria too. It is clear insofar as it refines the ideals to which moral actors subscribe – Berlin's distinction between positive and negative liberty is an

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<sup>96</sup> G. Crowder *Liberalism and Value Pluralism* 6. See also W.A. Galston *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge: Cambridge University Press, 2002) 33-34; C. Larmore *Patterns of Moral Complexity* 152-153.



obvious example of such precision<sup>97</sup> – and it is no less likely than value-monism to be consistent.<sup>98</sup> Because value-pluralists combine some values – they deny that ideals always collide – their theory is also coherent to the extent that they do so.

Of course, their understanding of morality would be even more coherent were they simply to renounce value-pluralism and to treat all (and not just some) values as compatible. A pure theorist ought to resist this move, however. To conclude that moral ideals never conflict, he or she must exaggerate the methodological significance of coherence and underrate that of comprehensiveness. In other words, he or she could only defend value-monism by failing to exercise proper judgment when applying these two norms. I say more about the notion of judgment in the next section. On the assumption that my examination of it is convincing, then a pure theorist ought to favour a conception of morality in which ideals frequently conflict.

Given Dworkin's moralistic case for value-monism and my non-moral explanation for value-pluralism, philosophical arguments exist for both descriptions of moral practice. The dispute between theorists about these

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<sup>97</sup> For a pithy statement of the difference between these two values, see I. Berlin 'Two Concepts of Liberty' 169.

<sup>98</sup> The fact that value-pluralism warrants incompatible actions in various situations does not mean that the theory itself is contradictory.

competing accounts of morality can thus be explained methodologically. I expressed my preference for pure analysis at the end of chapter one. In my opinion, therefore, value-pluralism is the appropriate source of content-dependent reasons for obedience and disobedience to the law. I now explore some implications of this conclusion.

#### **IV**

A predictable objection to value-pluralism – and so to my belief that one should rely on it when morally evaluating conduct whose performance the law requires – states that it is undermined by its inability to remedy the frequent conflicts between moral values to which it gives rise. This objection assumes that moral dilemmas need solutions, that value-pluralism cannot supply the requisite answers and that no moral theory can survive such a failure. Although I agree with the first and second of these premises, I dismiss the third – and, hence, the entire objection – by denying that responses to moral problems must be wholly theoretical and proposing another way of settling clashes between incommensurable ideals. Before examining this alternative method, I confirm the need for solutions to moral dilemmas and the inability of value-pluralism to provide them.

In the absence of a process for choosing between conflicting ideals, moral evaluation of conduct – including that which the law prescribes – would often be impossible. When two or more values clash, each justifies behaviour that is implicitly condemned by the other or others. Without a way of discriminating between these values, the different actions that they endorse would be simultaneously right and wrong. The manifest need to avoid this paradox entails the necessity of a method for dealing with situations in which moral values warrant incompatible actions.

One might think that Berlin provides the requisite means for solving moral dilemmas when he decrees that the appropriate responses to them depend on 'the kind of trade-offs which are required by a decent society.'<sup>99</sup> These trade-offs, he says, prevent 'the occurrence of desperate situations, of intolerable choices' by 'minimising' clashes between incommensurable moral values.<sup>100</sup> He describes such compromises as 'the first requirement for a decent society.'<sup>101</sup> Rather than solving moral dilemmas, though, they simply deny the existence of the conflicts that they purport to end. A trade-off presupposes the

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<sup>99</sup> I. Berlin in R. Jahanbegloo *Conversations With Isaiah Berlin* 150.

<sup>100</sup> I. Berlin 'The Pursuit of the Ideal' 15-16.

<sup>101</sup> I. Berlin 'The Pursuit of the Ideal' 15. Compare A. Margalit *The Decent Society* (Translated by N. Goldblum) (Cambridge, Mass.: Harvard University Press, 1996).

availability of – in Steven Luke's words – a 'common currency'.<sup>102</sup> For Berlin, this is the notion of decency. Yet to treat moral ideals as facets of decency is necessarily to deny their incommensurability. So Berlin must decide: either decency is the covering value that explains the relative significance of the rest or 'the belief that some single formula can in principle be found whereby all the diverse ends of men can be harmoniously realized is demonstrably false.'<sup>103</sup> He cannot affirm both propositions without contradiction.

Indeed, no philosopher can solve a genuine (as distinct from a merely apparent) moral dilemma by specifying an ideal or ideals of which every other is an aspect. But this impossibility does not prevent a theorist from ranking incommensurable values in an effort to settle conflicts between them. On the condition that at least some moral values do not emanate from the ideal or ideals to which they are deemed subordinate, then value-pluralism is compatible with a hierarchy that provides answers when they collide.<sup>104</sup>

In the previous section, I outlined Rawls's attempt to overcome clashes between moral criteria of a particular type. His theory of justice indicates the order in which these norms ought to be satisfied without denying the

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<sup>102</sup> S. Lukes 'Making Sense of Moral Conflict' in N.L. Rosenblum (ed.) *Liberalism and the Moral Life* (Cambridge, Mass.: Harvard University Press, 1989) 134. See also S. Lukes *Liberals & Cannibals: The Implications of Diversity* 66-67.

<sup>103</sup> I. Berlin 'Two Concepts of Liberty' 214.

<sup>104</sup> Compare G. Crowder *Liberalism and Value Pluralism* 51-52.

authenticity of the dilemmas that they generate. It elevates two of them above the rest and gives priority to the first over the second and – within the latter – to equality of opportunity over material equality. According to Rawls, this arrangement is in reflective equilibrium with familiar opinions on the topic.

Just as a value-monist must adopt Rawls's approach when seeking to defend the structure of his or her theory,<sup>105</sup> a value-pluralist whose goal is to rank incommensurable values must strive for reflective equilibrium between the configuration that he or she proposes and the beliefs of moral actors. Rawls's method is the most promising way of justifying an account of morality that arranges values hierarchically and so it must be implemented by both of these philosophers. Yet can its potential be realised?

Even if one is convinced by Rawls's (knowingly imprecise<sup>106</sup>) use of it to support his version of justice – and such endorsement requires, for example, acceptance of his controversial claim that the priority of individual liberties over material equality accords sufficiently with everyday convictions about justice – one might nevertheless query its ability to validate a description of morality as a whole. Indeed, I believe that attainment of the desired equilibrium is jeopardised by the sheer complexity of moral practice. A theory that specifies

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<sup>105</sup> See section three.

<sup>106</sup> See J. Rawls *A Theory of Justice* 18, 43.

the position of every single value in relation to every other and that coincides adequately with the diverse opinions of moral actors is, I think, quite unlikely. Given this implausibility, I conclude that neither a value-monist nor a value-pluralist – both of whose accounts of morality are unrestricted in scope – can justify a hierarchy among moral ideals.

My scepticism about the prospect of a Rawlsian remedy to the problem of priority that confronts value-monists means that I doubt the viability of their theory. Rather than exploiting the apparent vulnerability of value-monism, however, I wish to consider the implications for value-pluralism of the probable failure of Rawls's method to identify the order in which all incommensurable norms ought to be realised. If moral dilemmas need solutions and if value-pluralism cannot provide the necessary answers due to the absence of a reliable means of doing so – if, in other words, the first two premises of the objection are correct – then what follows? Is value-pluralism inevitably doomed?

Its inability to settle clashes between incommensurable values leads to its demise only if replies to moral questions must be entirely theoretical. The third premise of the objection supposes that answers of any other kind are arbitrary and thus neglects the possibility of a method for solving dilemmas that is merely consistent with (as opposed to supplied by) the theory of value-



pluralism. In my opinion, however, such an alternative means is available to participants in moral practice. When the ideals of which they speak require incompatible actions, they can – and actually must – decide on the appropriate response by exercising judgment. Their ability to choose in this way denies the assumption on which the third premise of the objection depends and is, therefore, my topic until the end of the present section.

Judgment involves the application of general norms to specific facts. When moral actors rely on it to discriminate between conflicting ideals, they focus on – to use Charles Larmore's phrase – 'the particularity of a given situation'.<sup>107</sup> Hence, they comply with the principal tenet of casuistry that 'circumstances alter cases'.<sup>108</sup> Yet they eschew the 'probabilism' of which many casuists are guilty (and to which the poor reputation of casuistry is surely attributable).<sup>109</sup> Whereas a probabilist sanctions any conduct for which a moral justification is merely (and perhaps not very) likely, these moral actors discriminate between the (possibly numerous) ideals whose relevance to a particular set of circumstances is no less than plausible and select the value

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<sup>107</sup> C. Larmore *Patterns of Moral Complexity* 20.

<sup>108</sup> H.A. Bedau *Making Mortal Choices: Three Exercises in Moral Casuistry* (Oxford: Oxford University Press, 1997) 102.

<sup>109</sup> For discussion, see H.A. Bedau *Making Mortal Choices: Three Exercises in Moral Casuistry* 104; A.R. Jonsen & S. Toulmin *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley, California: University of California, 1988).

whose application is most appropriate. Their attention to the precise context of each moral dilemma enables them to choose between the incommensurable values involved.

Indeed, Berlin – notwithstanding his comments on decency – seems to regard adoption of this method as indispensable whenever moral ideals clash. ‘The concrete situation,’ he declares, ‘is almost everything.’<sup>110</sup> Although he does not elaborate on the role of judgment in moral practice, his discussion of its use by politicians can be modified to compensate for his omission.<sup>111</sup>

In respect of politics, he claims that ‘what matters is to understand a particular situation in its full uniqueness, the particular men and events and dangers, the particular hopes and fears which are actively at work in a particular place at a particular time: in Paris in 1791, in Petrograd in 1917, in Budapest in 1956, in Prague in 1968 or in Moscow in 1991.’<sup>112</sup> He identifies successful politicians – whose moral status might be less impressive<sup>113</sup> – by their capacity to ‘grasp the unique combination of characteristics that constitute this particular situation – this and no other.’<sup>114</sup> Their ability to do so, he insists, is

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<sup>110</sup> I. Berlin ‘The Pursuit of the Ideal’ 15.

<sup>111</sup> See G. Crowder *Isaiah Berlin: Liberty and Pluralism* 140.

<sup>112</sup> I. Berlin ‘Political Judgement’ in *The Sense of Reality: Studies in Ideas and their History* (Edited by H. Hardy, with an introduction by P. Gardiner) (London: Pimlico, 1997) 44-45.

<sup>113</sup> See I. Berlin ‘Political Judgement’ 47.

<sup>114</sup> I. Berlin ‘Political Judgement’ 45.

different from other qualities that both they and less competent politicians might possess:

It is a sense for what is qualitative rather than quantitative, for what is specific rather than general; it is a species of direct acquaintance, as distinct from a capacity for description or calculation or inference; it is what is variously called natural wisdom, imaginative understanding, insight, perceptiveness, and, more misleadingly, intuition (which dangerously suggests some almost magical faculty), as opposed to the markedly different virtues – very great as these are – of theoretical knowledge or learning, erudition, powers of reasoning and generalisation, intellectual genius.<sup>115</sup>

The technique whose exercise Berlin deems vital for the proper application of political norms also enables participants in moral practice to settle clashes between incommensurable ideals. By paying attention to the precise circumstances of each dilemma, the latter can overcome the paradox that would otherwise defeat value-pluralism.

Of course, the particular facts of which moral actors take account when they judge between conflicting values can be neither listed nor limited in advance. Previous events in their own lives are, however, likely to be part of the context in which they decide. According to Charles Taylor, their choices are liable to be affected by the recognition that certain ideals 'play different roles and have different places (and this also may mean different times) in [their]

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<sup>115</sup> I. Berlin 'Political Judgement' 46.

lives.<sup>116</sup> He ascribes the potential impact of these biographical details to the wish of every person for a coherent life: 'In the end, what we are called on to do is not just carry out isolated acts, each one being right, but to live a life, and that means to be and become a certain kind of human being.'<sup>117</sup> Given this aspiration, participants in moral practice might discriminate between conflicting values with (some, but not exclusive) reference to 'the way [these ideals] fit, or fail to fit, together in the unfolding of [their] lives.'<sup>118</sup> The biographical unity that humans desire can thus help them to deal with clashes between the diverse values of which morality consists.

George Crowder agrees that the 'background commitments [...] of the individuals concerned' might provide such assistance.<sup>119</sup> Yet he is mistaken about the way in which the past conduct of moral agents can influence their responses to dilemmas. For Crowder, the specific circumstances of each case generate 'decisive reasons to choose in one direction rather than another'.<sup>120</sup> Hence, he maintains that 'background commitments, like those of the judge or

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<sup>116</sup> C. Taylor 'Leading a Life' in R. Chang (ed.) *Incommensurability, Incompatibility and Practical Reason* (Cambridge, Mass.: Harvard University Press, 1997) 180.

<sup>117</sup> C. Taylor 'Leading a Life' 179.

<sup>118</sup> C. Taylor 'Leading a Life' 180.

<sup>119</sup> G. Crowder *Isaiah Berlin: Liberty and Pluralism* 140.

<sup>120</sup> G. Crowder *Isaiah Berlin: Liberty and Pluralism* 140.

the official or the loving son, may help us to resolve conflicts rationally.<sup>121</sup> But the assistance that the particular context affords to moral actors when values clash can never be rational. Since their concern is the application of reasons to the precise circumstances of the case, they cannot logically treat the latter as a source of the former.<sup>122</sup> To the extent that they purport to do so, they actually apply a further norm to the specific facts and not one of those between which they claim to decide. Crowder is wrong, therefore, to describe their choices as susceptible to 'reasoned justification'.<sup>123</sup>

Moreover, the application of norms to particular facts cannot be theorised.<sup>124</sup> Berlin's distinction between the practical and the intellectual skills of politicians follows from such an impossibility, as does his denial that judgment 'can literally be taught'.<sup>125</sup> Charles Larmore also recognises '[t]his inability to arrive at a general theory of judgment' and notes the corollary that '[w]e appear able to say only what judgment is *not*, and not what it *is*'.<sup>126</sup> Yet the absence of a philosophical description of judgment is likely to prompt the

<sup>121</sup> G. Crowder *Isaiah Berlin: Liberty and Pluralism* 140.

<sup>122</sup> See, for example, O. O'Neill *Bounds of Justice* 55.

<sup>123</sup> G. Crowder *Isaiah Berlin: Liberty and Pluralism* 140-141.

<sup>124</sup> On the limits of philosophical reflection on decision-making, see I. Berlin 'An Introduction to Philosophy' in B. Magee (ed.) *Men of Ideas: Some Creators of Contemporary Philosophy* (London: British Broadcasting Corporation, 1978) 32-33; J. Raz *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) v-vi.

<sup>125</sup> I. Berlin 'Political Judgement' 45.

<sup>126</sup> C. Larmore *Patterns of Moral Complexity* 20. (Emphasis in original.)

criticism that it is too mysterious to be a plausible means of solving moral dilemmas.<sup>127</sup> My reply to this objection occupies the rest of the current section. I begin by stressing the frequent need for judgment and then illustrate the falsity of the complaint with reference to a couple of examples.

Far from being obscure, judgment is necessarily involved in every decision to treat a specific norm as the ultimate justification for an action.<sup>128</sup> Notwithstanding the order to which this norm belongs, the actor must exercise judgment in choosing to act on it. The reason that he or she picks as decisive might be moral or political or a member of some other category. It might even be philosophical.<sup>129</sup>

The actor may select this reason from two or more of the same type. Perhaps the norms between which he or she discriminates are moral, for instance. If so, the judgment on which his or her choice depends can be labelled as such. Then again, the actor might prefer the decisive reason to one or more of a different kind or of different kinds. The judgment that is required in this

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<sup>127</sup> For recognition (and subsequent rejection) of this criticism, see C. Larmore *Patterns of Moral Complexity* 152.

<sup>128</sup> My remarks in these paragraphs draw on my analysis of acceptance in the second section of the first chapter.

<sup>129</sup> On the role of judgment in philosophy, see the penultimate section of chapter one.



alternative scenario – which includes the actor's decision to accept (and thereby grant authority to<sup>130</sup>) a particular set of rules – might be called 'ethical'.<sup>131</sup>

Of course, the norm that motivates a deliberate action need not always be chosen (and thus result from the use of judgment) by the actor. His or her temperament and the power of another person or other people are also possible explanations for the precise reason that he or she regards as decisive. Whether individually or jointly, these facts are able to effect the actor's participation – including the *way* in which he or she takes part – in a specific practice.

But his or her action can never be caused by the decisive reason itself. To suppose that norms determine their own application is to imagine that they control human action. If they were capable of doing so, then *that* would be mysterious. Their inability to exclude human agency is recognised by Onora O'Neill. Norms, she says, 'are abstract entities; they do not act or cause; they are at most guide-lines for those who act or cause.'<sup>132</sup> Whether a norm provides the ultimate justification for a particular action cannot depend on it alone. Instead, the actor's reliance on it must be caused by something else. Alongside his or her

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<sup>130</sup> See chapter two on the connection between the ideas of acceptance and authority.

<sup>131</sup> By claiming that ethics leads to (rather than presupposes) participation in a specific practice, I define it neither as equivalent to morality nor as a professional code of conduct. For a similar view, see B. Williams *Ethics and the Limits of Philosophy* (London: Fontana, 1985) 6.

<sup>132</sup> O. O'Neill *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* 81.

temperament and the power of another person or other people, judgment is a potential explanation for the actor's belief that it is decisive.

Note that reference to one or more of these facts is necessary to account for the participation in moral practice of a value-monist no less than that of a value-pluralist. Simply because a norm always (and not merely sometimes) motivates a moral actor does not mean that it alone can bring about his or her conduct. Its ability to control behaviour is not related to the frequency with which he or she relies on it. That a reduction in the number of intrinsic values to one or a few – rather than many – cannot eliminate the indeterminacy of a moral theory is illustrated by the difficulties that utilitarians often experience when seeking to ascertain the practical implications of the value on whose sovereignty they concur. Something except utility – such as judgment – is required to explain its support for a particular action (and not another).

The indeterminacy of norms does not render them otiose, however. Their irrelevance follows from the impossibility of their self-application only if they must function as sufficient causes of action or not at all. According to this additional premise, a decision to act must be a norm-free response to a particular set of facts. Yet the inability of a norm to generate conduct on its own does not mean that it cannot have any impact on a choice to behave in a specific

manner. Indeed, a decision to act that ignores all norms is quite implausible. Without norms, observes O'Neill, 'we would drift through the flotsam of available descriptions and perceptions, unable to orient ourselves on a course of action or life, to navigate among existing possibilities or institutions, to chart our way to new ones, or to reason with those with whom we are not already in agreement.'<sup>133</sup> So norms – despite their inability to effect conduct by themselves – are essential for practical decision-making. Although they do not provide 'an auto-pilot for life', says O'Neill, they nevertheless 'structure and constrain it.'<sup>134</sup>

Since every decision to act necessarily involves consideration of general norms as well as specific facts, then judgment – which applies the former to the latter – must often be exercised. Various philosophers acknowledge this need. Aristotle does so in his account of practical wisdom,<sup>135</sup> as does Kant when he distinguishes between 'the faculty of rules' and 'the faculty of subsuming under rules'.<sup>136</sup> Both of these theorists – notwithstanding the significant differences between them – recognise that judgment is necessary whenever the norm that motivates a deliberate action is chosen by the actor. Given the frequency (and

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<sup>133</sup> O. O'Neill *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* 88-89.

<sup>134</sup> O. O'Neill *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* 78.

<sup>135</sup> See Aristotle *The Nicomachean Ethics* (Translated by W.D. Ross) (Oxford: Oxford University Press, 1925) Book VI.

<sup>136</sup> See I. Kant *Critique of Pure Reason* (Translated by N. Kemp Smith) (London: Macmillan, 1963) 177.

the appreciation by numerous philosophers) of this requirement, the claim that judgment is mysterious seems dubious. Moreover, a brace of fictional examples confirms its falsity. The first of the pair is my invention; the second is from a novel by Ian McEwan.

Sarah promises to meet one of her friends in a local restaurant for dinner. They agree to meet at eight o'clock. Sarah decides to walk to the restaurant via a nearby park. When she leaves her house, she has plenty of time to make the journey. While in the park, however, she sees three men attacking a young woman. As Sarah approaches, the men run away. The woman is injured and very frightened. Sarah tries to comfort her. Unfortunately, no one else is around and Sarah feels unable to leave the woman in such distress. A passing jogger eventually contacts the emergency services. When help arrives, Sarah leaves for the restaurant. She gets there just after nine o'clock, but her friend has already left.

On the assumption that Sarah decides to break her promise to her friend because of her desire to care for the victim of the assault, then she exercises moral judgment.<sup>137</sup> She discriminates between the conflicting values of compassion and promise-keeping by considering the particular circumstances.

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<sup>137</sup> I also assume that her compassion is genuine and that she is not motivated by a selfish (and thus non-moral) aspiration to avoid feelings of guilt.

Given that her selection of the former as the ultimate justification for her action is plainly correct, her use of judgment is anything but mysterious. That she judges appropriately does not entitle her to forget about her broken promise, however, and she should contact her friend at the earliest opportunity to explain her late arrival at the restaurant.<sup>138</sup>

My contention that Sarah's case demonstrates the normality of judgment might be criticised in at least three different ways. First, one might protest that the ease with which she decides on the right action indicates the absence of a genuine conflict between the moral ideals with whose application to the particular situation her judgment is allegedly concerned. This objection supposes that every moral dilemma must be difficult to solve. Although the proper application of incommensurable values is often challenging (and perhaps so demanding that any criticism of the decision-maker would be inappropriate<sup>139</sup>), it might sometimes be easy.<sup>140</sup> The loss that inevitably results from sacrificing one value or several values for the sake of another does not mean that the choice between them must be painful. Tragedy is not inevitable when incomparable norms clash. In some circumstances, the solution might be

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<sup>138</sup> On the importance of such rectificatory action, see O. O'Neill *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* 160; O. O'Neill *Bounds of Justice* 62-63.

<sup>139</sup> See I. Berlin in S. Lukes 'Isaiah Berlin: In Conversation with Steven Lukes' 107-108.

<sup>140</sup> See W.A. Galston *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* 35.

obvious. Far from revealing that the values involved are actually coherent, this fact merely demonstrates that judgment can be straightforward.

Alternatively, one might argue that Sarah should keep her promise and neglect the victim of the assault. Rather than questioning the normality of judgment, though, this objection merely disputes Sarah's use of it. By denying that she ought to break her promise, one presupposes that judgment can solve her dilemma. To believe that Sarah should ignore the woman and meet her friend for dinner, however, is to exercise judgment badly. Although such a conclusion is *rational* – it is justified by the value of promise-keeping – it is certainly not *reasonable*.

Finally, one might attack the fictional nature of the example.<sup>141</sup> According to this third objection, Sarah's use of judgment is suspect because the greater complexity of reality might produce another outcome. Yet her judgment is hardly undermined by pointing out that she might choose differently in altered circumstances. Since judgment involves focusing on a particular context, it requires sensitivity to changes in that context. Hence, one must assume that no relevant details are missing from Sarah's case when assessing her use of judgment. One cannot suppose that she is able to prevent the conflict between

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<sup>141</sup> For discussion of such criticisms, see B. Williams 'A Critique of Utilitarianism' in J.C.C. Smart & B. Williams *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973) 96-97.



the values of compassion and promise-keeping by calling the emergency services on a mobile phone, for instance. In the example, Sarah does not have a mobile phone. If she did, of course, then she ought to use it. Only a person whose judgment is poor would refuse to avert a moral dilemma when given an adequate opportunity to do so.<sup>142</sup>

I now turn to the second example. Whereas the norms between which Sarah chooses are both moral, the values that conflict in this case belong to different orders. The judgment involved is, therefore, ethical. The decision-maker is Clive Linley, a character in Ian McEwan's *Amsterdam*.<sup>143</sup>

Clive is a composer whose current project is to write a government-commissioned symphony that commemorates the end of the twentieth century. Lacking inspiration for the theme of the finale, he goes walking in the Lake District. While on top of a crag, he hears a bird call that suggests the melody for which he has been searching. He starts to write out the tune that he hopes will be 'the dead century's elegy',<sup>144</sup> but is distracted by an argument between a man and a woman that is taking place just below him. He tries to ignore their dispute, but the woman's voice becomes louder and he looks down to see the

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<sup>142</sup> See O. O'Neill *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* 160; O. O'Neill *Bounds of Justice* 60-62.

<sup>143</sup> I. McEwan *Amsterdam* (London: Vintage, 1998).

<sup>144</sup> I. McEwan *Amsterdam* 20.

man grab the woman's arm. As they tussle, Clive wonders whether he should intervene:

The woman shouted again and Clive, lying pressed against the rock, closed his eyes. Something precious, a little jewel, was rolling away from him. [...] The jewel, the melody. Its momentousness pressed upon him. So much depended on it: the symphony, the celebration, his reputation, the lamented century's ode to joy. He did not doubt that what he heard could bear the weight. In its simplicity lay all the authority of a lifetime's work. He also had no doubt that it was not a piece of music that was simply waiting to be discovered; what he had been doing, until interrupted, was *creating* it, forging it out of the call of a bird, taking advantage of the alert passivity of an engaged creating mind. What was clear now was the pressure of choice: he should either go down and protect the woman, if she needed protection, or he should creep away round the side of Glaramara to find a sheltered place to continue his work – if it was not already lost. He could not remain here doing nothing.<sup>145</sup>

Although the man now has hold of the woman's wrist and is trying to drag her to a nearby area that is more sheltered, Clive decides not to help her. Instead, he climbs down the crag to a quieter spot and tries to recall the melody. He is sure that his action is correct:

If he had approached the couple, a pivotal moment in his career would have been destroyed. The melody could not have survived the psychic flurry. Given the width of the ridge and the numerous paths that crossed it, how easily he could have missed them. It was as if he wasn't there. He wasn't there. He was in his music. His fate, their fate, separate paths. It was not his business. This was his

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<sup>145</sup> I. McEwan *Amsterdam* 87.

business, and it wasn't easy, and he wasn't asking for anyone's help.<sup>146</sup>

Whatever the probability that the tune will transform the symphony into a masterpiece – Clive hopes to be as great as Beethoven,<sup>147</sup> but his inability to produce more than a 'shameless copy' of the 'Ode to Joy' leads eventually to the cancellation of the premiere<sup>148</sup> – and notwithstanding the fact that the woman actually escapes from the man,<sup>149</sup> Clive's decision is obviously wrong. Whether the ultimate cause of his action is a wish to create a great work of art or a desire for the fame that artistic success might bring, his failure to act morally demonstrates poor judgment. That he should try to help the woman is obviously the correct response, ethically as well as morally. Although Clive focuses on the particular circumstances of the case – including his own life and the place of the symphony in it<sup>150</sup> – his judgment is defective. He denounces other people for 'assuming the licence of the free artistic spirit' to justify their absence from events that they have previously agreed to attend,<sup>151</sup> yet the criticism that he deserves for choosing his symphony over the plight of the woman is much greater. Furthermore, his subsequent failure to report the

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<sup>146</sup> I. McEwan *Amsterdam* 88-89.

<sup>147</sup> See I. McEwan *Amsterdam* 76

<sup>148</sup> See I. McEwan *Amsterdam* 176.

<sup>149</sup> See I. McEwan *Amsterdam* 118.

<sup>150</sup> See also I. McEwan *Amsterdam* 26, 82.

<sup>151</sup> See I. McEwan *Amsterdam* 61-62.

incident to the police simply increases the extent to which he is blameworthy. By not performing this rectificatory action, Clive denies the police a possible opportunity to prevent the 'Lakeland Rapist' from attacking a final victim.<sup>152</sup>

Since the correctness of Sarah's decision to help the young woman in the park and the wrongness of Clive's preference for artistic labour are readily apparent, these examples show that judgment is not mysterious and can be used to discriminate between incommensurable norms (whether of the same or different kinds). The availability of this method for dealing with clashes between moral ideals refutes the objection that value-pluralism is unable to solve the dilemmas to which it gives rise. It might, therefore, provide content-dependent reasons to obey and disobey the law.

## V

Some philosophers regard liberalism as a necessary consequence of value-pluralism. For them, a commitment – such as mine – to the latter as the source of content-dependent grounds for obedience and disobedience to the law implies a belief that a moral actor has a reason to violate any primary rule whose substance the former condemns. In this final section, I briefly examine the link

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<sup>152</sup>

See I. McEwan *Amsterdam* 118.

between value-pluralism and liberalism on which these philosophers insist. By doing so, I hope to clarify (and thus prevent misinterpretation of) the account of moral practice that I defend in the present chapter.

Isaiah Berlin is the foremost proponent of the thesis that value-pluralism entails liberalism. Despite his apparent rejection of any logical connection between the two theories,<sup>153</sup> he maintains that 'toleration and liberal consequences follow' from the pluralist conception of morality to which he subscribes.<sup>154</sup> Negative liberty – which he defines as the absence of human interference<sup>155</sup> – is essential, he says, because participants in moral practice must be able to choose between incommensurable values when they conflict.<sup>156</sup> Yet he denies that liberty of this type must be 'the sole, or even the dominant, criterion of social action.'<sup>157</sup> He claims merely that value-pluralism requires 'a minimum degree of toleration'.<sup>158</sup>

Berlin is wrong, however, to suppose that liberalism must result from the regular need for moral actors to choose between values of intrinsic worth. He commits a non sequitur, as Crowder realises:

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<sup>153</sup> See I. Berlin in R. Jahanbegloo *Conversations With Isaiah Berlin* 44.

<sup>154</sup> I. Berlin 'My Intellectual Path' 53.

<sup>155</sup> See I. Berlin 'Two Concepts of Liberty' 169-178.

<sup>156</sup> I. Berlin 'Two Concepts of Liberty' 214.

<sup>157</sup> I. Berlin 'Two Concepts of Liberty' 214.

<sup>158</sup> I. Berlin in R. Jahanbegloo *Conversations with Isaiah Berlin* 44. See also I. Berlin 'Two Concepts of Liberty' 216.

This argument, at least in the form in which Berlin presents it, is clearly flawed. It is essentially an instance of the naturalistic fallacy, since it passes directly from the fact that choice is unavoidable to the value of freedom of choice. But the mere fact that choice is unavoidable does not make it (or the freedom with which to make it) valuable. Berlin himself observes that many choices among incommensurables are painful, even tragic. Why, then, should we value such choices or the freedom with which to make them? A better solution might be to avoid these choices as far as possible, and one way of doing so may be deliberately to reduce our negative liberty. The necessity of moral choice, alone, is compatible with authoritarian as well as with liberal politics.<sup>159</sup>

Although Berlin's 'argument from choice' fails, Crowder believes that it 'can be reconstructed to take us from pluralism to liberalism, but by way of positive liberty, not negative.'<sup>160</sup> According to Crowder, moral actors must be capable of individual self-direction if they are to choose between incompatible values and they are most likely to develop this capacity in a (certain kind of) liberal society.<sup>161</sup> He seeks to derive liberalism from value-pluralism by associating personal autonomy – as distinct from the mere absence of human interference – with both.

Yet his adaptation of Berlin's argument is no more successful than the original version. Even if the ideal of self-rule (or – as Berlin terms it – positive

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<sup>159</sup> G. Crowder *Isaiah Berlin: Liberty and Pluralism* 144. See also G. Crowder *Liberalism and Value Pluralism* 81-82.

<sup>160</sup> G. Crowder *Liberalism and Value Pluralism* 210. See also G. Crowder *Isaiah Berlin: Liberty and Pluralism* 168.

<sup>161</sup> See G. Crowder *Liberalism and Value Pluralism* 201-211; G. Crowder *Isaiah Berlin: Liberty and Pluralism* 167-168.



liberty<sup>162</sup>) is advanced most effectively by liberal institutions, it is not equivalent to the autonomy on which value-pluralism depends. A moral agent is unable to choose between conflicting values unless he or she can decide (and is not simply caused by his or her temperament or the power of another person or other people) to treat a particular value as the ultimate justification for his or her action. But such *formal* (or Kantian) autonomy – which is a precondition for all practical decision-making – is different from the *ideal* of self-determination that Crowder associates with liberalism. Indeed, a moral actor might choose a value other than self-rule as the decisive reason for his or her conduct in particular circumstances. Due to the distinct types of autonomy that value-pluralism requires and that liberalism allegedly promotes, Crowder's argument from choice founders too.

Perhaps liberalism can be obtained from value-pluralism by another means. Of the alternative strategies whose implementation he ponders, Crowder rejects all but a couple. He quickly discards Joseph Raz's attempt to connect the theories,<sup>163</sup> for instance, because it is 'a liberal case for pluralism, not a pluralist case for liberalism.'<sup>164</sup> He dismisses William Galston's argument that value-pluralism calls for and liberal institutions are best suited to the promotion

<sup>162</sup> See I. Berlin 'Two Concepts of Liberty' 177-181.

<sup>163</sup> See J. Raz *The Morality of Freedom* chapter fourteen.

<sup>164</sup> G. Crowder *Liberalism and Value Pluralism* 204.

of cultural diversity,<sup>165</sup> moreover, since Galston's brand of liberalism protects ways of life that value-pluralism condemns.<sup>166</sup> Although Crowder offers convincing reasons against the adoption of these and other ways of trying to prove that value-pluralism entails liberalism, he does not perceive the critical flaws in the two arguments on which he actually relies. The first of the pair – the argument from diversity<sup>167</sup> – wrongly supposes that the array of different ideals that value-pluralists describe is best accommodated by liberal institutions and not by a political system whose design is informed by every (rather than principally or entirely by one) incommensurable value, whereas the second – the argument from reasonable disagreement<sup>168</sup> – ignores the logical distinction between the fact of moral disagreement to which liberalism is allegedly the most appropriate response and the theory of value-pluralism.<sup>169</sup> Given the failure of Crowder's arguments from choice, diversity and reasonable disagreement as well as the apparent lack of any plausible alternatives to them, I presume that liberalism need not follow from the frequent incompatibility of moral values.

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<sup>165</sup> See W.A. Galston *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* chapter five.

<sup>166</sup> See G. Crowder *Isaiah Berlin: Liberty and Pluralism* 162-164.

<sup>167</sup> See G. Crowder *Liberalism and Value Pluralism* chapter six; G. Crowder *Isaiah Berlin: Liberty and Pluralism* 156-159.

<sup>168</sup> See G. Crowder *Liberalism and Value Pluralism* chapter seven; G. Crowder *Isaiah Berlin: Liberty and Pluralism* 159-161.

<sup>169</sup> See section two of the present chapter on this distinction.

Even if not implied by value-pluralism, however, certain liberal theories might be consistent with it. An account of morality in which freedom alone has intrinsic worth obviously denies that ideals conflict, but not every version of liberalism must do so. A theorist for whom liberty is the origin of merely some (as opposed to all) other values – the ideals of political morality, perhaps – does not reject value-pluralism. The priority of freedom over the rest of morality is also compatible with value-pluralism as long as not every subordinate value is purely instrumental. The best-known combination of liberalism and value-pluralism, though, is provided by John Rawls. His theory ranks principles of justice without denying that moral ideals often clash.<sup>170</sup>

Therefore, the interpretation of morality that I regard as the proper source of content-dependent reasons for obedience and disobedience to the law neither implies nor inevitably precludes liberalism. With this clarification, my argument is finished. If I am right that a pure analysis of moral practice is possible, that value-pluralism results from exclusive reliance by a moral philosopher on the norms of clarity, consistency, comprehensiveness and coherence and that moral dilemmas can be solved by exercising judgment, then a theory of the values that moral agents use to assess the substance of legal

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<sup>170</sup> For discussion of his theory, see section three.

obligations need not depict one or a few of those values as the origin of every other. Instead, it might regard many of them as ends-in-themselves. Due to my preference for pure analysis, moreover, I believe that it ought to look upon them as such. Hence, I conclude that value-pluralism makes most sense of the moral ideals that supply content-dependent reasons for obedience and disobedience to the law.

## Moral Reasons II: Legitimacy

If – as I contend in chapter three – value-pluralism is the best interpretation of the ideals that moral actors cite as content-dependent reasons to obey and disobey the law, then this theory – since it is a general account of morality – is also the proper source of other moral grounds for compliance and noncompliance with primary rules. It thus provides the context within which I continue to examine obedience and disobedience to legal requirements by people for whom moral norms have authority. More precisely, it is the starting-point for the pure analysis of content-independent moral reasons to obey and disobey the law that I expound in the present chapter.<sup>1</sup>

The existence of such a reason is contingent on evaluation of something other than the behaviour on which the law insists. Whereas moral appraisal of the substance of a legal duty is typically – but not always<sup>2</sup> – a matter of justice, principles of *legitimacy* supply participants in moral practice with content-independent reasons to obey and disobey the law. These principles are

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<sup>1</sup> Although my discussion focuses on content-independent moral reasons for *obedience* to legal rules, I do not rule out the possibility of disobedience to the law by moral actors whose motivation is content-independent.

<sup>2</sup> See my brief remarks on compassion at the start of chapter three.

obviously distinct from the standards on which a social scientist is likely to rely when he or she describes a particular state as legitimate. They do not define legitimacy – as the principal social-scientific criteria do – in terms of the feelings of people towards the system of law under which they live. As John Simmons observes, 'this [empirical] account implies[...] that states can acquire or enhance their [legitimacy] by misleading or by indoctrinating their subjects, or on the strength of subjects' extraordinary stupidity, immorality, or imprudence.'<sup>3</sup> The norms that furnish moral agents with content-independent reasons for obedience and disobedience to the law instead refer – in Simmons's words – 'to more [...] morally significant features of the state's history, character, or relations with its subjects.'<sup>4</sup>

Yet these principles are not identical – although they might be related – to those that moral agents employ when assessing the substance of a legal duty. In common with most other political philosophers, Ronald Dworkin acknowledges this lack of equivalence: 'What test must a government meet to be legitimate? We cannot say that it is not legitimate unless it is perfectly just: that would be

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<sup>3</sup> A.J. Simmons 'Political Obligation and Authority' in R.L. Simon (ed.) *The Blackwell Guide to Social and Political Philosophy* (Oxford: Blackwell Publishers, 2002) 23.

<sup>4</sup> A.J. Simmons 'Political Obligation and Authority' 23.



too strong a requirement [...].<sup>5</sup> For Dworkin – as I explain in the third section of chapter three – the justice of a legal system is determined by ‘the best, most accurate understanding of the two principles of [ethical individualism].’<sup>6</sup> But he denies that state-legitimacy requires flawless implementation of the specific brand of value-monism of which – in his view – the finest understanding of the sovereign moral values of equal importance and special responsibility consists. Whether the law is legitimate, he says, hinges on the answer to a different question: ‘What behavior of government would indicate that it has either not accepted the two principles as constraints on its conduct or that it is acting inconsistently with its own understanding of what they require?’<sup>7</sup> He thus regards the legitimacy of a legal system as contingent on the extent of the government’s commitment to a sincere – even if mistaken – reading of the supreme political ideal of equal concern. The government lacks legitimacy, he claims, insofar as it fails to ‘act as if the impact of its policies on the life of any citizen is equally important.’<sup>8</sup> Moreover, he charges a government that disregards the ideal of equal concern (and, consequently, the two principles of

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<sup>5</sup> R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press, 2006) 95.

<sup>6</sup> R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 96.

<sup>7</sup> R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 96.

<sup>8</sup> R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 97.

ethical individualism) with breaching the 'human' (and not merely the 'political') rights of its citizens.<sup>9</sup>

Dworkin, then, separates the issues of justice and legitimacy. He allows that an unjust state might be legitimate. Note, however, that he rejects the possibility of a legal system that is illegitimate yet just. He precludes such incompatibility by defining legitimacy as devotion to and justice as optimal realisation of the twin ideals of ethical individualism. Since allegiance to the sovereign values of equal importance and special responsibility is a necessary condition for seamless implementation of the best interpretation of them, he regards the legitimacy of a just legal system as unavoidable. But a value-pluralist – whose point of view I adopt in this chapter – can deny that every just state must be legitimate and that a moral actor inevitably has a content-independent reason to obey legal rules with which he or she has a content-dependent reason to comply. Although Dworkin's distinction between the justice and the legitimacy of the state enables him to ask whether participants in moral practice ought to obey an unjust law, his moralistic interpretation of their conduct means that he cannot envisage any situation in which principles of

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<sup>9</sup> See R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 30-36.

legitimacy condemn a legal norm whose substance is just. From the perspective of a value-pluralist, though, this scenario need not be invisible.

Philosophers tend to suppose that a moral actor refers to principles of legitimacy only when seeking to ascertain whether he or she has – in the philosophers' jargon, though not in ordinary language – a 'political obligation' to fulfil a particular legal duty. According to Simmons – who endorses this 'traditional' view – these philosophers define state-legitimacy as a 'logical correlate' of a political obligation.<sup>10</sup> I agree with them that the existence of a political obligation is a matter of legitimacy. I do not, however, share their assumption that the law cannot be legitimate in the absence of such a duty. By outlining the analysis of content-independent moral reasons for obedience and disobedience to legal norms that I develop in the current chapter, I can explain my disagreement with these philosophers (and, of course, provide some necessary guidance on the general direction of my enquiry).

My discussion focuses on two species of content-independent moral reasons to obey the law and, hence, consists of two parts. In the first section, I scrutinise the concept of political obligation and argue that moral appraisal of the mere existence of a primary rule determines whether there is a content-

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<sup>10</sup> A.J. Simmons 'Philosophical Anarchism' in *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001) 106.

independent reason of this kind for participants in moral practice to comply with it. Due to my rejection of certain additional elements that other theorists include in their accounts of political obligation, my analysis is rather controversial. Even so, I judge that my 'thin' conception better satisfies the meta-theoretical requirements of clarity, consistency, comprehensiveness and coherence (and thus increases understanding of the notion of political obligation to a greater extent) than their 'thicker' alternatives.

I then contemplate – in section two – another type of content-independent moral reason for compliance with a legal demand by examining the frequent assertion of (or about) participants in moral practice that they have a duty to obey the law because of the way in which it originates. More specifically, I reflect on the common belief that the allegedly 'democratic' creation – as opposed to the substance or the mere existence – of a primary rule supplies a moral reason to act in accordance with that rule. My study of this procedural sort of content-independent reason for obedience to the law by moral agents is, therefore, more limited – in one respect, at least – than the analysis of the very notion of political obligation that I develop in the first section. Notwithstanding the difference in scope between these two investigations, however, both deal with whether the law is legitimate. Unlike

the afore-mentioned philosophers for whom this topic is equivalent to that of political obligation, I hold that moral appraisal of the source of the law also depends on principles of legitimacy. Just as legal norms that there is a political obligation to obey are legitimate, so too is a primary rule whose origin gives moral actors a justification for compliance with it. Although I examine two kinds of content-independent moral reasons to obey the law in this chapter, my concern throughout is legitimacy.

## I

Most contemporary philosophers use the term 'political obligation' to refer exclusively to the species of content-independent moral reason for obedience to the law that is my subject in the present section, but some – as Leslie Green observes – maintain that 'it concerns both the responsive and active components of good citizenship, not merely [a content-independent moral] duty to obey the law, but also duties of participation, support for the government, and so forth.'<sup>11</sup> I employ the expression in its narrow and – among philosophers, at any rate –

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<sup>11</sup> L. Green *The Authority of the State* (Oxford: Clarendon Press, 1988) 222. See also W.A. Edmundson 'State of the Art: The Duty to Obey the Law' 10 *Legal Theory* (2004) 215, at 217; P. Harris 'The Moral Obligation to Obey the Law' in P. Harris (ed.) *On Political Obligation* (London: Routledge, 1990) 151; R.C.A. Higgins *The Moral Limits of Law: Obedience, Respect, and Legitimacy* (Oxford: Oxford University Press, 2004) 1; J. Horton *Political Obligation* (London: Macmillan, 1992) 15-17.

more popular sense. My stipulation is entirely for the sake of convenience and not because I reject the positive requirement to engage in politics – whether by taking part in a democratic process or otherwise – that also figures in the wider definition.

If there is a political obligation, a content-independent moral reason for obedience to the law must exist.<sup>12</sup> The same proposition can be put another way: participants in moral practice for whom there are no content-independent grounds for compliance with primary rules necessarily lack a political obligation.<sup>13</sup> Even in the narrow sense of the term that I adopt, however, a political obligation cannot be inferred merely from the fact that a moral agent has a content-independent reason to obey the law. No theorist claims that the existence of a reason with these characteristics alone is sufficient to establish a political obligation. But what further attributes must a content-independent moral reason for obedience to the law exhibit for a political obligation to obtain?

This is a conceptual question on whose answer philosophical consensus is limited. Notwithstanding their agreement that a political obligation – as a reason to obey the law – is both moral and content-independent, theorists differ somewhat as to the additional properties that it must possess. In the current

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<sup>12</sup> This statement is, of course, true on both definitions of a political obligation.

<sup>13</sup> For a similar formulation, see L. Green *The Authority of the State* 223.



section, I consider a number of qualities that are prominent candidates for inclusion in a description of political obligation and reject all but two of them. By doing so, I put forward an account that contradicts the incorporation of several of these contenders in every other theory with which I am familiar. Although my conception of political obligation is to this extent at odds with philosophical convention, I believe that the pure methodology whose feasibility I defend in chapter one – and of which the value-pluralism that frames my present discussion is a product – supports the particular interpretation that I offer.

Much of my analysis proceeds via engagement with the influential work of John Simmons. Unlike many of the contemporary theorists of political obligation with whom I share this common strategy, however, I do not seek to refute Simmons's 'philosophical anarchism' by directly contesting his wholesale rejection of or by proposing at least one alternative to the specific arguments for the existence of a political obligation that he contemplates.<sup>14</sup> Instead, I examine

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<sup>14</sup> On the nature of 'philosophical anarchism', see A.J. Simmons 'Philosophical Anarchism' 103-112. See also A.J. Simmons 'Associative Political Obligations' in *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001) 67; A.J. Simmons 'The Duty to Obey and Our Natural Moral Duties' in C.H. Wellman & A.J. Simmons *Is There a Duty to Obey the Law?* (Cambridge: Cambridge University Press, 2005) 190-191.

the criteria in terms of which – given the contingent features of existing states<sup>15</sup> – he dismisses all of these arguments as inadequate. Rather than asking (and thus assuming the particular standards that determine) whether a political obligation exists (or – to express the same enquiry differently – whether philosophical anarchism is true), I explore the nature of this content-independent moral reason for obedience to the law. Although my ‘structural’ investigation inevitably has ‘substantive’ implications,<sup>16</sup> I merely indicate some (and do not provide a thorough account) of the latter here. My immediate project is conceptual and its outcome differs from the understanding of political obligation on which Simmons’s philosophical anarchism depends. In spite of his convincing rejection of certain elements that appear in other conceptions of this moral duty, Simmons believes that every political obligation must – even if none actually does – fulfil a couple of requirements that are absent from my account. Insofar as he dismisses attempts to establish a political obligation due to their failure to meet these conditions, I thus challenge his philosophical anarchism.

<sup>15</sup> Whereas Robert Paul Wolff – see R.P. Wolff *In Defense of Anarchism* (Berkeley, California: University of California Press, 1998) chapter one – regards a political obligation as impossible, Simmons contends merely that none exists as a matter of fact. On the difference between these ‘a priori’ and ‘a posteriori’ strains of philosophical anarchism, see A.J. Simmons ‘Philosophical Anarchism’ 104-105; A.J. Simmons ‘The Duty to Obey and Our Natural Moral Duties’ 101.

<sup>16</sup> On this distinction, see P. Soper ‘The Obligation to Obey the Law’ in R. Gavison (ed.) *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Oxford: Clarendon Press, 1987) 127.

Because I situate my interpretation of political obligation within the context of value-pluralism, someone for whom Simmons's critique of 'pluralist' theories is compelling might simply discount my analysis of this content-independent moral reason for obedience to the law. Yet the 'pluralism' to which Simmons responds is not mine. He does not openly deny – and, indeed, much and perhaps even all of his case for philosophical anarchism seems consistent with<sup>17</sup> – the incommensurability of various moral ideals. The real target of his attack on 'pluralism' is, instead, the claim that philosophical anarchism can be defeated by adding together arguments for a political obligation that – according to a particular conception of this duty – do not yield a content-independent moral reason to obey the law on their own.<sup>18</sup> Chaim Gans, for example, declares that 'a single complex combining [...] four arguments supplies the firmest and most successful basis for political obligation.'<sup>19</sup> Yet Simmons denies that philosophical anarchism can be overcome by 'cobbl[ing] together' several ineffective attempts to do so.<sup>20</sup> He insists that such pluralism-

<sup>17</sup> See below.

<sup>18</sup> For discussion of this type of pluralism, see J. Wolff 'Pluralistic Models of Political Obligation' 56 *Philosophica* (1995) 7, at 15.

<sup>19</sup> C. Gans *Philosophical Anarchism and Political Disobedience* (Cambridge: Cambridge University Press, 1992) 89. See also G. Klosko *Political Obligations* (Oxford: Oxford University Press, 2005) 98-102.

<sup>20</sup> See A.J. Simmons 'Philosophical Anarchism' 115-116; A.J. Simmons 'Political Obligation and Authority' 35-36.

as-aggregation still fails to satisfy at least one necessary condition – namely, the requirement of ‘generality’<sup>21</sup> – for the existence of a political obligation.<sup>22</sup> Although I omit this condition from my conception of political obligation, I do not thereby endorse the brand of pluralism that Gans promotes. His version is a substantive response to Simmons’s philosophical anarchism, whereas mine provides the location for my analysis of the structural beliefs about political obligation on which Simmons relies.

Before examining the various qualities that contemporary philosophers regard as the distinctive elements of a political obligation, I wish to reflect briefly on two attributes that scarcely figure in their accounts of this content-independent moral reason to obey the law. Notwithstanding the almost complete lack of enthusiasm among philosophers for incorporation of these traits in the meaning of political obligation, contemplation of them enables me to indicate the pluralist perspective from which I reject all but one of the features that *are* prevalent in current definitions. The first ‘unwanted’ characteristic that I consider is ‘singularity’ and the second is ‘absoluteness’.

If singularity is necessary for the existence of a political obligation, then there cannot be more than one such content-independent moral reason for

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<sup>21</sup> I say more about this criterion below.

<sup>22</sup> See A.J. Simmons ‘Political Obligation and Authority’ 36.

obedience to the law. Simmons – in his swift rejection of this proviso – remarks that ‘a *presumption* in favor of singularity seems, in the absence of a special argument, unwarranted.’<sup>23</sup> The most plausible rationale for its appearance in a theory of political obligation is that clashes might result if there were various content-independent moral reasons of this type to obey the law. As Jonathan Wolff observes, however, ‘whether the different grounds [would] generate conflicts, and, if so, whether there [would be] any difficulty in resolving them [remains to be seen].’<sup>24</sup> Indeed, a value-monist for whom a political obligation need not be unique would write off any conflicts as merely apparent. Although the refusal of a value-pluralist to treat singularity as an essential feature of a political obligation might (but need not) produce genuine clashes between content-independent moral reasons for obedience to the law, the use of judgment – see the penultimate section of chapter three – would enable resolution of these potential dilemmas. Neither a value-monist nor a value-pluralist, then, must accept the requirement of singularity. Both can recognise various political obligations and the latter – whose position I assume here – allows for conflict between these multiple duties. Singularity is, therefore, not a property that a political obligation needs to possess.

<sup>23</sup> A.J. Simmons *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979) 35.

<sup>24</sup> J. Wolff ‘Pluralistic Models of Political Obligation’ 14.



Exclusion of the condition of singularity from the meaning of political obligation entails rejection of the second 'unwanted' element. If there might be various political obligations, then a theorist cannot insist that each of them is absolute (or – to use an equivalent term – conclusive). Omission of this requirement from an account of political obligation also results from the widely-held conviction that something else might determine the moral correctness of obedience to the law. That Simmons leaves the quality of absoluteness out of his theory is thus a necessary implication of his repeated claim that neither the existence nor the lack of a political obligation has direct practical consequences.<sup>25</sup> His dismissal of this attribute due to the existence of moral reasons of alternative kinds for obedience and disobedience to the law means that his anarchism is less radical than one might expect: '[T]here is a significant difference between the practical stances of a *philosophical* anarchist – who denies [a political obligation] to obey but in no way sanctions routine legal nonconformity, active resistance, or revolution – and a *political* anarchist committed to the overthrow of existing states (and to the ultimate replacement of states with alternative forms of social organization).'<sup>26</sup>

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<sup>25</sup> See, for example, A.J. Simmons *Moral Principles and Political Obligations* 11, 29-30, 193; A.J. Simmons 'The Duty to Obey and Our Natural Moral Duties' 191.

<sup>26</sup> A.J. Simmons 'The Duty to Obey and Our Natural Moral Duties' 191-192. See also A.J. Simmons 'Philosophical Anarchism' 104, 109.



The philosophical nature of Simmons's anarchism, then, indicates the absence of the requirement of absoluteness from his understanding of political obligation. Yet his concurrence with the notion that moral agents have reasons of more than one type to obey and disobey the law is not sufficient to make him a value-pluralist. Proponents of value-monism can also accept this proposition. Contrary to value-pluralism, though, they insist on the compatibility of all moral obligations. Indeed, Simmons appears to state his agreement with their belief in the unity of morality when he says that moral duties – including those to obey and disobey the law – can be ‘balanced’ or ‘weighed’ against one another.<sup>27</sup> These metaphors – together with the image of a ‘trade-off’ between competing moral requirements that Isaiah Berlin employs<sup>28</sup> – suppose the existence of a sovereign moral value in terms of which others might be compared. They imply the homogeneity of all (and, consequently, the impossibility of clashes between any) moral reasons. Yet perhaps Simmons does not intend to use these metaphors so precisely. If he means only that moral actors can choose between competing obligations in particular contexts, then he does not necessarily reject value-pluralism. Although one ought not to assume such imprecision, the possibility that – his language notwithstanding – he

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<sup>27</sup> See especially A.J. Simmons ‘Philosophical Anarchism’ 108-110.

<sup>28</sup> For discussion, see the penultimate section of chapter three.

recognises genuine conflicts between moral reasons for obedience and disobedience to the law – of which political obligations are a species – still remains.

No matter whether Simmons omits the conditions of singularity and absoluteness from his conception of political obligation as a value-monist or a value-pluralist, I leave them out of mine from the perspective of the latter. I reject these characteristics by admitting the prospect of real clashes both between different political obligations and between political and other sorts of moral obligations. If not singular and absolute, however, then what must a reason for obedience to the law be – other than moral and content-independent, of course – to qualify as a political obligation? I now examine six properties for whose inclusion in the definition of this moral duty many philosophers contend. Not every philosopher endorses all of the attributes that I consider, but each of these traits is nevertheless prevalent in the literature on the subject. The extensive support that they receive explains my contemplation of them. Yet their philosophical popularity does not cause me to incorporate any more than two of the half-dozen conditions in my account of political obligation. Despite widespread approval for the requirements of 'minimal justice', 'universality', 'generality' and 'particularity', I accept none of them and maintain that a

content-independent moral reason to obey the law need only be 'non-procedural' and 'complete' to constitute a political obligation.

For numerous theorists, there can be no political obligation unless the mere existence of a legal duty to perform a specific action provides a moral reason for doing so. Leslie Green is prominent among these philosophers. He recognises such a condition when he says that a political obligation depends on whether 'the fact that the state requires something of us itself changes our moral position [...]'.<sup>29</sup> Green is mistaken, though, to describe this feature of a political obligation as 'content-independence'.<sup>30</sup> A participant in moral practice might have a reason to comply with a primary rule as a result neither of its subject-matter nor of its very status as law, but due instead to the way in which it originates. Given the possibility – whose exploration I undertake in the next section – that a moral agent has a reason to obey a legal norm because of the nature of the process that generates it, then (the meta-theoretical ideal of clarity requires that) a moral reason for obedience to the law must be 'non-procedural' as well as content-independent to amount to a political obligation.

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<sup>29</sup> L. Green *The Authority of the State* 225. See also R.C.A. Higgins *The Moral Limits of Law: Obedience, Respect, and Legitimacy* 1; J. Raz *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 234.

<sup>30</sup> See L. Green *The Authority of the State* 225-226. For another instance of the same error, see W. Edmundson 'State of the Art: The Duty to Obey the Law' 216.

A moral duty to obey the law that is based on the mere fact of legal validity must also possess the quality that I entitle 'completeness'.<sup>31</sup> None of the philosophers whose definitions of political obligation feature this attribute use my label. Instead, they employ terms such as 'comprehensiveness',<sup>32</sup> 'universality'<sup>33</sup> and 'generality'<sup>34</sup> to signify it. My desire to avoid any confusion – however improbable – with the meta-theoretical ideal of the same name prompts my eschewal of the first of these alternatives, whereas I reject the second and third of them because they are my designations for two of the other elements that frequently appear in theories of political obligation.

To be complete, a political obligation – as a moral reason to obey the law *qua* law – must apply to every duty that a state imposes. A content-independent moral reason for compliance with fewer than all of the primary rules of a legal system does not fulfil this requirement and so cannot be a political obligation. Hence, as Simmons says, one cannot have such 'a moral obligation to refrain from legally prohibited theft because of a promise made to one's mother to so

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<sup>31</sup> Discussion with Jonathan Crowe and Dale Smith improved my understanding of this condition.

<sup>32</sup> See G. Klosko *Political Obligations* 12; L. Green 'Legal Obligation and Authority' in E.N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (Spring 2004 edition) <http://plato.stanford.edu/archives/spr2004/entries/legal-obligation/section3>.

<sup>33</sup> See L. Green *The Authority of the State* 228-229; R.C.A. Higgins *The Moral Limits of Law: Obedience, Respect, and Legitimacy* 31.

<sup>34</sup> See J. Raz *The Authority of Law: Essays on Law and Morality* 234; A.J. Simmons 'Political Obligation and Authority' 18.

refrain.<sup>35</sup> Only a promise to obey the law as a whole would supply a moral reason for obedience to the law that satisfies the requirement of completeness.<sup>36</sup>

I suggest that incorporation of these two conditions in a theory that otherwise defines a political obligation as a content-independent moral reason to obey the law is not only necessary, but also – and here I depart from philosophical consensus – *sufficient*. On my conception, a political obligation is a ground for compliance with a legal duty that is entirely contingent on moral appraisal of the fact that the law insists on the behaviour in question. I claim – to put the same point differently – that a moral reason to obey the law need not be more than content-independent, non-procedural and complete (and that possession of none of the other four recommended qualities is necessary) for a political obligation to obtain. Hence, I spend the remainder of the present section arguing – in exclusively meta-theoretical terms – for the adequacy of my ‘thin’ conception of political obligation and so against the need to supplement the conditions to which Ted Honderich’s definition implicitly refers:

Political obligation [...] is a supposed moral obligation to act legally, a moral obligation to act in accordance with ordinary law, the law of the United States, the United Kingdom, Germany,

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<sup>35</sup> A.J. Simmons ‘Political Obligation and Authority’ 18.

<sup>36</sup> Arguments whose failure is liable to result from a lack of completeness include those that seek to ground a political obligation in utility – since non-compliance with at least some primary rules is often likely to promote overall welfare. See L. Green *The Authority of the State* 230; R.C.A. Higgins *The Moral Limits of Law: Obedience, Respect, and Legitimacy* 38.

France or the like. More precisely, members of a society are morally obliged to act in certain ways for a reason involving the fact that these are the legal ways. Members of a society ought to act so as to obey the laws of the society for a reason having to do in some way or other with the existence of the laws. They are not to act in other ways for a reason having to do with their illegality.<sup>37</sup>

What, though, if the primary rule to which a moral agent contemplates obedience is not part of the law of, say, the United Kingdom – to use one of Honderich's examples – but belongs, instead, to the legal system of South Africa during the period of *apartheid*? If a political obligation to obey the rule is at least possible in the first situation, might a moral reason of this kind for obedience to the same rule also obtain in the second? For many philosophers, there can be no political obligation to comply with any duty that is imposed by such an unjust regime. They regard 'minimal justice' as a prerequisite for the existence of a political obligation.<sup>38</sup>

Although I reject this proviso, my reason for doing so is not – as one might suppose – because it imposes a content-related limit on a content-independent moral reason for obedience to the law and thereby confuses the issues of justice and legitimacy. Were implementation of the requirement of

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<sup>37</sup> T. Honderich *Terrorism for Humanity: Inquiries in Political Philosophy* (London: Pluto Press, 2003) 172.

<sup>38</sup> Green describes the belief that 'a threshold condition of justice [must be] met' as 'common ground' among theorists of political obligation: see L. Green 'Legal Obligation and Authority'.



minimal justice wholly contingent on moral evaluation of the substance of the specific legal norm to which a question of obedience pertains, then a political obligation would no longer be a content-independent moral reason to obey the law. Yet the morality of a particular action that the law demands is relevant to the proviso only insofar as such an assessment has an impact on whether the legal system as a whole is suitably – which, I assume, does not mean perfectly – just. Since an entire state (and not an individual norm) is the subject of the condition of minimal justice, a philosopher does not compromise the content-independent status of political obligation by including the requirement in his or her understanding of this moral reason for obedience to the law.

Despite the lack of contradiction between the notions of content-independence and minimal justice, I still omit the latter from my account of political obligation. George Klosko provides a moralistic case for its inclusion in his theory. He cites ‘basic moral principles’ in defence of his claim that ‘an acceptable (legitimate) government must be democratic, must be tolerably just, and not engage in wholesale violation of rights.’<sup>39</sup> But a *pure* conception of political obligation ought not to feature the condition of minimal justice. Even if – since the proviso is concerned with a complete system of law and not a specific

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<sup>39</sup> G. Klosko *Political Obligations* 9.

primary rule – the meta-theoretical value of consistency does not justify its exclusion, then that of *clarity* surely does.

Philosophers of whose accounts of political obligation the requirement is an element mix up a *substantive* issue with a *structural* one. Rather than treating the extent to which a legal system conforms to standards of justice as merely a particular argument for the existence of a political obligation, they additionally or alternatively look upon it as a criterion by which to evaluate all such arguments. John Rawls regards it as both. He holds not only that the 'natural duty of justice' gives a moral agent a content-independent and non-procedural reason to obey all of the rules of a legal system that is reasonably just,<sup>40</sup> but also that sufficient conformity to principles of justice is a prerequisite for the existence of any political obligation whatsoever. For Rawls, no-one can be bound to a state that 'exceed[s] the limits of tolerable injustice'.<sup>41</sup> He maintains, therefore, that a political obligation can be established by neither voluntary acceptance of benefits from nor consent to an unjust system of laws.<sup>42</sup>

Yet an account of political obligation from which the requirement of minimal justice is absent realises the meta-theoretical ideal of clarity to a greater extent than an interpretation of which this proviso is an aspect. By limiting the

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<sup>40</sup> See J. Rawls *A Theory of Justice* (Revised ed.) (Oxford: Oxford University Press, 1999) 99.

<sup>41</sup> J. Rawls *A Theory of Justice* 96.

<sup>42</sup> See J. Rawls *A Theory of Justice* 96-97.

relevance of state-justice to the success of a particular attempt to ground a political obligation, a philosopher distinguishes more precisely between structural and substantive matters. He or she thus agrees with Simmons – in whose theory of political obligation the condition of minimal justice does not figure – that people might ‘have obligations of fair play to co-operate within unjust schemes’<sup>43</sup> and might ‘bind [themselves] to an unjust institution through a deliberate act of consent.’<sup>44</sup> Although – as Simmons recognises<sup>45</sup> – the potential for conflicts – whether genuine or merely apparent – between moral obligations follows from the possibility of a content-independent reason for a moral agent to obey the rules of an unjust system of law, a pure theorist – on the assumption that he or she endorses value-pluralism – ought not to be troubled by the prospect of these clashes.

Of the six conditions that are popular supplements to the basic notion of a political obligation as a content-independent and moral reason for obedience to the law, the requirement of minimal justice is not the only one to which a pure theorist should object. He or she ought also to deny the need for a political obligation to possess the characteristic of ‘universality’. Recall Simmons’s

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<sup>43</sup> A.J. Simmons ‘The Principle of Fair Play’ in *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001) 9.

<sup>44</sup> A.J. Simmons *Moral Principles and Political Obligations* 79.

<sup>45</sup> See A.J. Simmons *Moral Principles and Political Obligations* 78-79.

example of a promise to one's mother to comply with the legal prohibition on theft. Now suppose that one's pledge extends to every duty that the state imposes and so provides a moral reason to obey the law that satisfies the requirement of completeness. Many philosophers would still deny that this promise generates a political obligation because very few – if any – other people actually – and not just hypothetically – have the same reason to obey the law. For these philosophers, a political obligation must be universal.<sup>46</sup> It must, they contend, be a moral reason for either everyone or no-one to obey legal demands.

But moral obligations do not normally depend on the number of people to whom, as a matter of fact, they apply – Sarah's duty to meet her friend in a local restaurant for dinner is not contingent on whether an identical requirement actually binds anyone else<sup>47</sup> – and I am not aware of any reason for a pure theorist to depart from ordinary understandings of morality by inserting the condition of universality in the meaning of political obligation. I thus refuse to accept that a content-independent reason for a moral agent to obey the law cannot be a political obligation unless it is universal too.

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<sup>46</sup> See, for instance, L. Green *The Authority of the State* 228-229; L. Green 'Legal Obligation and Authority' section 3; R.C.A. Higgins *The Moral Limits of Law: Obedience, Respect, and Legitimacy* 31; J. Raz *The Authority of Law: Essays on Law and Morality* 234.

<sup>47</sup> I discuss Sarah's case in the fourth section of chapter three.

My response to the common suggestion that every political obligation must feature the attribute of universality is similar to the reaction of Simmons to such a proposal. He states:

I suggest that this "all-or-nothing" attitude is confused primarily because I can see no obvious objections to a theory which allows that some people have political obligations while others[...] do not. A theory of political obligation ought to tell us what class of people are bound to their governments, and why; if it tells us that only certain people are so bound, people who have, say, performed some special act, the theory is not obviously defective because it tells us this.<sup>48</sup>

Although he dismisses the need for a political obligation to be universal, Simmons claims that it must nevertheless apply to 'most persons in most states'.<sup>49</sup> He thus replaces the condition of universality with that of 'generality'.<sup>50</sup> His alternative proviso – which other theorists also recommend<sup>51</sup> – is the fifth of the six qualities that I consider for incorporation in the definition of political obligation. Having endorsed the view that this content-independent reason for a moral actor to obey the law must be non-procedural and complete yet opposed the addition of the requirements of minimal justice and universality to its

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<sup>48</sup> A.J. Simmons *Moral Principles and Political Obligations* 36. See also G. Klosko *Political Obligations* 10; J. Wolff 'Pluralistic Models of Political Obligation' 15-16.

<sup>49</sup> A.J. Simmons 'The Duty to Obey and Our Natural Moral Duties' 190.

<sup>50</sup> For explicit acceptance of the need for a political obligation to be general, see A.J. Simmons *Moral Principles and Political Obligations* 56; A.J. Simmons 'Political Obligation and Authority' 18.

<sup>51</sup> See, for example, G. Klosko *Political Obligations* 10.

meaning, I now ask whether generality is a characteristic that a political obligation needs to exhibit.

This condition is central to Simmons's case for philosophical anarchism. He dismisses various arguments for the existence of a political obligation due to their failure 'to apply to [...] most real citizens of real states.'<sup>52</sup> The pluralistic means by which Chaim Gans strives to overcome philosophical anarchism is not the only potential strategy for establishing a political obligation of whose generality Simmons is critical.<sup>53</sup> He also objects to arguments based on consent due to the fact that hardly anyone agrees – whether explicitly or tacitly<sup>54</sup> – to obey the law.<sup>55</sup> Every attempt to root a political obligation in consent, he says, 'fails to give a suitably general account of our political obligations'.<sup>56</sup> Moreover, he regards 'fair-play' arguments that seek to ground a moral reason of this kind in voluntary acceptance of benefits from a co-operative scheme as similarly flawed:

Most citizens will, I think, fall into one of these two classes: those who have not "accepted" because they have not taken the benefits

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<sup>52</sup> A.J. Simmons 'The Duty to Obey and Our Natural Moral Duties' 101.

<sup>53</sup> See above.

<sup>54</sup> On this distinction, see A.J. Simmons 'The Duty to Obey and Our Natural Moral Duties' 117.

<sup>55</sup> See especially A.J. Simmons *Moral Principles and Political Obligations* 79, 93-94; A.J. Simmons 'Political Obligation and Authority' 33-34; A.J. Simmons 'The Duty to Obey and Our Natural Duties' 117-118.

<sup>56</sup> A.J. Simmons *Moral Principles and Political Obligations* 95.



(with accompanying burdens) willingly, and those who have not “accepted” because they do not regard the benefits of government as the products of a co-operative scheme. But if most citizens cannot be thought to have voluntarily accepted the benefits of government from the political co-operative scheme, then the fair play account of political obligation will not be suitably general in its application [...].<sup>57</sup>

But the ‘transactional’ arguments – as he labels them<sup>58</sup> – of consent and fair-play are not the only casualties of Simmons’s insistence on generality: natural-duty and utilitarian arguments are victims too.<sup>59</sup> With respect to the former, he observes that ‘a natural duty to promote justice or to support just institutions [...] would not appear to yield anything much like a uniform duty to obey the law even in a reasonably just society’ because ‘obedience or disobedience of [the] law is simply not likely to have *any* interesting effect, good or ill, on the stability, efficiency, or justice of a near-just institutional structure.’<sup>60</sup> He offers a similar explanation for his rejection of utilitarian arguments: ‘[W]hile disobedience may often have worse [...] consequences than obedience, there is

<sup>57</sup> A.J. Simmons *Moral Principles and Political Obligations* 139. See also A.J. Simmons ‘The Principle of Fair Play’ 24-25.

<sup>58</sup> See A.J. Simmons ‘Political Obligation and Authority’ 24; A.J. Simmons ‘The Duty to Obey and Our Natural Moral Duties’ 102-103.

<sup>59</sup> Note that I do not follow Simmons’s classification of utilitarianism as the source of one sort of ‘natural-duty’ argument for a political obligation: see A.J. Simmons ‘Political Obligation and Authority’ 27; A.J. Simmons ‘The Duty to Obey and Our Natural Moral Duties’ 103.

<sup>60</sup> A.J. Simmons ‘The Duty to Obey and Our Natural Moral Duties’ 168.

no guarantee that this will be the case, and we are all perfectly acquainted with the many commonplace instances in which it quite plainly is not the case.’<sup>61</sup>

Given the considerable emphasis that Simmons puts on the need for a political obligation to be sufficiently general – indeed, his case for philosophical anarchism depends on the failure of certain arguments to satisfy this condition – one might expect him to justify its place in his theory. Yet he is surprisingly ambivalent about whether a political obligation must possess the property of generality:

While I am not personally dedicated to finding such a general account [...], it is clear that most of those who have advanced accounts of political obligation have regarded generality (or even “universality” [...]) as the primary criterion of success. We can, then, adopt this wider criterion of success as a [...] standard against which to measure suggested accounts. Insofar as an account fails this test of generality, it fails to fill the role in political theory which an account of political obligation has been thought to fill by most political theorists.<sup>62</sup>

Simmons, then, seems to incorporate the attribute of generality in his conception of political obligation only because of the regularity with which it features in other interpretations. Philosophical consensus is not, however, an adequate reason for its appearance in his theory. The fact that the characteristic of generality receives widespread support from other philosophers merely

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<sup>61</sup> A.J. Simmons ‘Political Obligation and Authority’ 25. See also A.J. Simmons ‘The Duty to Obey and Our Natural Moral Duties’ 125.

<sup>62</sup> A.J. Simmons *Moral Principles and Political Obligations* 56.

suggests the potential availability of – but does not actually provide – a justification for putting it in his definition of political obligation. Moreover, Simmons does not treat the evident popularity of the conditions of minimal justice and universality as an obstacle to his dismissal of *them*. Indeed, his objection to the need that many philosophers perceive for a political obligation to be universal also necessitates rejection of his alternative requirement of generality. If – as he says in response to the frequent insistence on universality – he ‘can see no obvious objection to a theory which allows that some people have political obligations while others[...] do not’,<sup>63</sup> then he must deny – when, in fact, he asserts – the need for a political obligation to be suitably general. And my criticism of the contention that a moral duty of this sort must bind everyone also pertains to Simmons’s alternative criterion. If the existence of a moral reason for action is not normally contingent on the extent of its application, then the requirement of generality flouts ordinary beliefs about morality no less than that of universality. Contrary to Simmons and the numerous philosophers to whom he apparently defers, therefore, the proviso of generality ought not to feature in an account of political obligation.

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<sup>63</sup> A.J. Simmons *Moral Principles and Political Obligations* 36.

My dismissal of the conditions of universality and generality implies that – to return to the amended version of Simmons’s example – one might have a political obligation as a result of a promise to one’s mother to comply with the law. Yet what if this pledge – because, say, one is about to go on holiday – were to extend to the duties imposed by a state of which one is not a citizen? Could such an undertaking generate a political obligation? According to Simmons, its scope would prevent it from doing so. He maintains that a political obligation must be peculiar to the law of the community to which one belongs. His conception of political obligation thus includes the last of the requirements that I consider, which both he and I call ‘particularity’.

Simmons insists that ‘a moral reason for supporting other states as fully as we support our own could not be a political obligation.’<sup>64</sup> Given his association of political obligation with citizenship, he rejects all attempts to ground this type of moral reason for obedience to the law in a natural duty to support just institutions:

[S]uppose that I am a citizen living under a just government. While it follows that I have an obligation to support my government, it does not follow that there is anything *special* about this obligation. I am equally constrained by the same moral bond

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<sup>64</sup> A.J. Simmons ‘Political Obligation and Authority’ 30. See also A.J. Simmons *Moral Principles and Political Obligations* 31-35; A.J. Simmons ‘Associative Political Obligations’ 68; A.J. Simmons ‘Political Obligation and Authority’ 29-30; A.J. Simmons ‘The Duty to Obey and Our Natural Moral Duties’ 110.

to support *every other* just government. Thus, the obligation [...] would not bind me to any particular political authority in the way we want.<sup>65</sup>

Alongside the proviso of generality, the condition of particularity is central to Simmons's defence of philosophical anarchism. Although he is not the only philosopher for whom a political obligation must bind a citizen exclusively to his or her own state,<sup>66</sup> the degree of Simmons's emphasis on particularity is unique. In comparison to his tentative endorsement of the need for generality, moreover, his dedication to this requirement is obvious. He justifies its place in his theory with reference to the prevalent belief among moral agents that a citizen has a special tie to his or her own state. Accounts of political obligation from which the condition of particularity is absent, he suggests, neglect a prominent aspect of moral discourse.<sup>67</sup>

Simmons's claim that 'positive' morality vindicates his inclusion of particularity among the essential features of a political obligation is surprising, however, given the evident scepticism with which he treats the moral opinions

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<sup>65</sup> A. J. Simmons *Moral Principles and Political Obligations* 31. See also A.J. Simmons 'Associative Political Obligations' 68; A.J. Simmons 'Political Obligation and Authority' 30; A.J. Simmons 'The Duty to Obey and Our Natural Moral Duties' 166.

<sup>66</sup> See, for example, L. Green *The Authority of the State* 227; G. Klosko *Political Obligations* 12.

<sup>67</sup> See A.J. Simmons 'Associative Political Obligations' 68; A.J. Simmons 'Political Obligation and Authority' 29; A.J. Simmons 'The Duty to Obey and Our Natural Moral Duties' 110.



of citizens regarding their states.<sup>68</sup> In response to the objection that philosophical anarchism is at odds with the typical attitudes of participants in moral practice, he cautions against immediate acceptance of the common belief that a political obligation exists. His doubts as to the reliability of this conviction derives from the circumstances of its formation:

Especially where relations of domination and subjection are at issue, as they certainly are in all organized political societies with functioning legal systems, we should be extremely wary of trying to defend judgments about moral duty by simple appeal to the feelings of the subjects – feelings of duty that may be straightforward components of “false consciousness” or perhaps just uncritically accepted sentiments of loyalty to the dominant authorities in one’s domain.<sup>69</sup>

Simmons cites ‘[t]he clear instrumental value to political and legal superiors (and, more generally, to those enjoying positions of privilege) of an inculcated popular sense of duty to obey, along with the wide variety of means of inculcation available to leaders and to the privileged in modern states’ as the ‘obvious sources’ of his reservations concerning everyday opinions on the existence of a political obligation.<sup>70</sup> Due to the context in which these attitudes develop, Simmons is adamant that ‘we should not regard such feelings as

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<sup>68</sup> On the distinction between ‘positive’ and ‘critical’ morality, see H.L.A. Hart *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963) 20.

<sup>69</sup> A.J. Simmons ‘The Duty to Obey and Our Natural Moral Duties’ 99.

<sup>70</sup> A.J. Simmons ‘The Duty to Obey and Our Natural Moral Duties’ 99. See also A.J. Simmons *Moral Principles and Political Obligations* 195; A.J. Simmons ‘Philosophical Anarchism’ 120;



justified, or as accurately tracking true obligations, unless we can support them by reference to some intelligible line of moral reasoning.<sup>71</sup> He thus insists on the need for substantive appraisal of them. His analysis, of course, finds these conventional views about political obligation wanting.

The circumstances that prompt Simmons to doubt these opinions also warrant scepticism about the shared belief of participants in moral practice that they owe distinctive obligations to the states of which they are citizens. Yet – notwithstanding the absence of any discernible reason for doing so<sup>72</sup> – Simmons effectively dismisses state-power as a probable cause of the latter conviction by relying directly on it to support his avowal of a necessary connection between political obligation and citizenship. His apparent trust in the common feeling among moral actors that they have special duties to the law of the community to which they belong conflicts with his insistence on the need for critical assessment of their general belief in the existence of a political obligation.

Simmons's immediate acceptance of the familiar view that a citizen has a special tie to his or her own state – as implied by the explanation that he offers for the requirement of particularity – not only contradicts his wary approach to other widespread opinions about the relationship between citizens and their

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<sup>71</sup> A.J. Simmons 'Political Obligation and Authority' 23. See also A.J. Simmons 'The Duty to Obey and Our Natural Moral Duties' 98.

<sup>72</sup> See W.A. Edmundson 'State of the Art: The Duty to Obey the Law' 232.

state, but is also at variance with his critique of attempts to establish a political obligation on membership of a specific community. He classifies these arguments as 'associative'<sup>73</sup> and his response to them warrants rejection of the facet of positive morality on which he grounds his contention that a political obligation cannot apply to more than one legal system.

Ronald Dworkin presents an associative case for the existence of a political obligation. Whether a moral agent has a duty of this kind, he asserts, depends on his or her identity as a member of a 'true' political community whose government is committed to – even if it fails to realise the finest interpretation of – the twin principles of ethical individualism.<sup>74</sup> He holds that citizens owe a political obligation to their state '[o]nly so long [...] as it accepts the equal importance of their lives and their personal responsibility for their own lives and tries to govern them in accordance with its sincere judgement of what those dimensions of dignity require.'<sup>75</sup>

Simmons objects to the moralistic conception of fraternity on which this argument rests. By defining community in terms of the ideal of equal concern, he says, Dworkin effectively denies that a political obligation is a communal

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<sup>73</sup> See A.J. Simmons 'Associative Political Obligations'; A.J. Simmons 'Political Obligation and Authority' 24; A.J. Simmons 'The Duty to Obey and Our Natural Moral Duties' 102.

<sup>74</sup> See R. Dworkin *Law's Empire* 195-206; R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 95-97.

<sup>75</sup> R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 96-97.

responsibility and treats it instead as a natural duty to support legitimate states.<sup>76</sup> Yet Simmons also criticises associative arguments that eschew such moralism due to their failure to explain the moral force that they attribute to communal roles.<sup>77</sup> Consequently, he declares that a single predicament scuppers every attempt to ground a political obligation in membership of a community:

The claims about our moral duties or obligations made by [a]ssociative theories are (and need to be) either too strong to be plausible or too similar to the claims made in [other] theories to be interestingly distinguishable from them. Thus, [a]ssociative theories are hung on the horns of a dilemma. They must either make claims that are counterintuitive and indefensible, or (once their claims are rendered plausible) they must collapse into some kind of non-[a]ssociative theory.<sup>78</sup>

Despite his powerful critique of these arguments, Simmons nevertheless maintains that a political obligation must bind a citizen exclusively to his or her own state. By including the requirement of particularity in his account of this duty, however, he ignores the reasons that he provides – even if only by implication – for querying and then rejecting the general belief that a moral actor has distinctive responsibilities to the law of the political community to which he or she belongs. This tension results from the fact that Simmons treats

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<sup>76</sup> See A.J. Simmons 'Associative Political Obligations' 79; A.J. Simmons 'The Duty to Obey and Our Natural Moral Duties' 189.

<sup>77</sup> See A.J. Simmons 'Associative Political Obligations'; A.J. Simmons 'Political Obligation and Authority' 31-32; A.J. Simmons 'The Duty to Obey and Our Natural Moral Duties' 112-115.

<sup>78</sup> A.J. Simmons 'The Duty to Obey and Our Natural Moral Duties' 111.

the notion of particularity as relevant both to an attempt to establish a specific as well as to the nature of every political obligation. In doing so, he mistakes a *substantive* question – whether citizenship alone provides a moral agent with a reason to fulfil the duties imposed by a state – with a *structural* matter – whether a moral agent can have a political obligation to a state of which he or she is not a citizen. In common with philosophers whose accounts of political obligation feature the condition of minimal justice,<sup>79</sup> Simmons converts the premise of a moral argument into a conceptual necessity. Like them, moreover, he must alter his definition of political obligation if he wishes to realise the meta-theoretical ideal of clarity.

Only by dropping the requirement of particularity from his account – by denying that particularity is one of the particularities of political obligation, in other words – can Simmons achieve such precision. Were he to effect this deletion, then he would inevitably admit the possibility of conflict between political obligations to different legal systems. Although he expresses concern at this prospect,<sup>80</sup> his anxiety is puzzling – Edmundson favours the epithet ‘hyperbolic’<sup>81</sup> – given his recognition elsewhere – most notably when

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<sup>79</sup> See above.

<sup>80</sup> See A.J. Simmons ‘Political Obligation and Authority’ 29-30; A.J. Simmons ‘The Duty to Obey and Our Natural Moral Duties’ 167-168.

<sup>81</sup> W.A. Edmundson ‘State of the Art: The Duty to Obey the Law’ 232.

considering the practical implications of philosophical anarchism<sup>82</sup> – that moral obligations might clash. Simmons should, therefore, proceed with the excision that clarity recommends.

Indeed, both he and every other philosopher ought to exclude from the concept of political obligation all but two of the properties that their conceptions tend to feature. They should leave the requirements of minimal justice, universality, generality and particularity out of their accounts and hold that a political obligation obtains whenever a content-independent reason for a moral agent to obey the law is non-procedural and complete. According to this interpretation, moral appraisal of the mere existence of a primary rule determines whether there is a political obligation to comply with the law. This definition may seem thin, but I think that it better satisfies the meta-theoretical standards on which pure theorists rely than thicker alternatives. Hence, I adopt it – and urge Simmons and other philosophers to adopt it too.

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<sup>82</sup> See, for example, A.J. Simmons *Moral Principles and Political Obligations* 11, 29-30, 193; A.J. Simmons 'Philosophical Anarchism' 109; A.J. Simmons 'The Duty to Obey and Our Natural Moral Duties' 191-192.

## II

A political obligation is not the sole type of content-independent reason for which a moral agent might obey a legal norm: he or she might regard the origin – as opposed to the mere existence – of the law as a reason to act legally. Perhaps he or she lives in the United Kingdom, for example, and believes that the supposedly ‘democratic’ character of the law-making process contributes to the legitimacy of the state and so furnishes him or her with a reason to comply with some (and maybe all) of the legal requirements to which he or she is subject – even if they demand behaviour that principles of justice condemn.<sup>83</sup> Although his or her opinion is common among (and frequently voiced by) participants in moral practice, its popularity does not mean that it is sound. The availability of support for it is my topic in this (relatively short) section.

The rest of the present chapter, then, focuses on some ways in which a moral actor for whom the ‘democratic’ nature of the state provides a reason to obey the law might seek to explain his or her conviction. Unlike the structural analysis of political obligation that occupies the previous section, my examination of this second kind of content-independent moral reason for

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<sup>83</sup> Note that his or her conviction does not suppose that he or she takes part in the procedure. Whether such involvement generates a moral reason for obedience to the law – based on implied consent – is a matter of political obligation. For discussion, see P. Singer *Democracy and Disobedience* (Oxford: Clarendon Press, 1973) 49-50.



obedience to the law is neither conceptual nor comprehensive. I do not explore the nature of this reason, but look instead at a familiar assertion about its existence. My analysis is, therefore, wholly substantive. Moreover, my exclusive focus on a specific – albeit prevalent – allegation as to the circumstances in which the source of a legal requirement warrants lawful conduct means that my investigation is restricted in scope. From the perspective of a pure theorist whose conception of morality is pluralistic, I consider the justifiability of this contention alone.

In examining potential arguments for the widespread conviction among moral actors that they have an obligation to obey ‘democratic’ law, however, I need not comment on the accuracy with which they use this adjective. My concern is not the real meaning – whatever that may be<sup>84</sup> – of ‘democracy’. Rather, I am interested in how participants in moral practice might defend their claim that the law-making process that they – even if some philosophers do not – call ‘democratic’ gives them a content-independent reason to obey the law. Although my discussion reaches no overall conclusion (and is thus limited in more than scope), I nevertheless make a number of observations about the values that they might cite in an attempt to vindicate their belief.

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<sup>84</sup> Given the extent to which people disagree about this form of government, I doubt that a pure analysis of it is possible.

If 'democracy' advances no moral ideal, then it cannot justify obedience to the law. Yet this species of government might be morally valuable without establishing a *content-independent* reason for a moral agent to obey the primary norms that it yields. Were its moral worth due entirely to its perceived ability to produce (or even guarantee<sup>85</sup>) just outcomes, then a participant in moral practice would have no more than a *content-dependent* reason to comply with the law. Hence, attempts to explain 'democratic' government with reference to the substance of the norms that it generates cannot support the everyday view whose moral justification is my subject here. Since not every argument for 'democracy' is relevant to my present concern, moreover, then whether a moral agent has a content-independent reason for obedience to legal requirements as a result of their 'democratic' pedigree does not necessitate reflection on the optimal method of law-making. Alexander Pope describes this latter (and larger) issue as one that 'fools contest'.<sup>86</sup> The topic that he scorns is not, however, mine.

To supply moral actors with a content-independent reason for obedience to the law, 'democracy' itself must – even if the law that it creates does not –

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<sup>85</sup> On such 'perfect procedural justice', see J. Rawls *A Theory of Justice* 74; J. Rawls *Political Liberalism* (New York: Columbia University Press, 1996) 72.

<sup>86</sup> A. Pope 'An Essay on Man' in *The Poems of Alexander Pope* (Edited by J. Bett) (London: Routledge, 1963) 3rd epistle, line 303.

promote one or more of the ideals on which these actors rely. Yet to which – if any – moral principles does it conform? I now consider some answers to this question. The first response at which I look is both the most obvious and the least convincing.

Perhaps the 'democracy' that many moral agents regard as a content-independent reason for obedience to the law serves the value of *democracy*. If this proposed justification for their conviction is to succeed, then democracy – in its 'true' sense – must be a moral ideal as well as a particular form of government and the process that these moral actors classify as 'democratic' must actually be so. David Held seems to propose a conception of democracy according to which it is inherently valuable. Indeed, he appears to define it as the supreme moral ideal: 'The *idea* of democracy is important because it does not just represent one value among many, such as liberty, equality or justice, but is the value that can link and mediate among competing prescriptive concerns.'<sup>87</sup>

Given my commitment to value-pluralism, I inevitably reject Held's belief in the sovereignty of democracy. Yet I also deny its purported status as a moral ideal. Although I refrain from conceptual analysis of democracy in the current section, I nevertheless doubt that an institutional mechanism for the

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<sup>87</sup> D. Held *Models of Democracy* (2<sup>nd</sup> edition) (Cambridge: Polity Press, 1996) 298.

production of law can be a moral value. Ross Harrison is sceptical too: 'Democracy is not a value in itself – if it is valuable, it is for some further reason.'<sup>88</sup> By proposing a theory of value-monism that is distinct from the version advanced by Held, moreover, Ronald Dworkin agrees that the moral significance of democracy must be explained in terms of other ideals.<sup>89</sup> Participants in moral practice for whom the 'democratic' character of the state affords a content-independent reason to obey legal norms must, then, seek support for their opinion elsewhere.

They might (and are likely to) look to the value of *autonomy* instead. More precisely, they might claim that 'democracy' provides them with a reason for obedience to the law because it promotes the ideal that Isaiah Berlin calls 'positive liberty'.<sup>90</sup> This potential argument supposes that citizens of the United Kingdom and other ostensibly 'democratic' states govern themselves. But do they? A cursory inspection – anything more rigorous would be otiose – of the

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<sup>88</sup> R. Harrison *Democracy* (London: Routledge, 1993) 133.

<sup>89</sup> See R. Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996) 17; R. Dworkin *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006) 156, 161; R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 134.

<sup>90</sup> For a concise statement of the difference between 'positive' and 'negative' liberty, see I. Berlin 'Two Concepts of Liberty' in *Liberty* (Edited by H. Hardy, with an essay on Berlin and his critics by I. Harris) (Oxford: Oxford University Press, 2002) 169.

extent to which contemporary 'democracies' satisfy the necessary conditions for self-rule indicates that they do not.

The 'democratic' governments to whose law obedience is allegedly warranted are invariably representative in form. Only on the rare occasion of a referendum do their citizens make the law directly. Yet the practice of representation is inimical to self-determination. A citizen – as Rousseau notes<sup>91</sup> – relinquishes his or her autonomy whenever he or she permits someone else to impose duties on him or her. Benjamin Barber even suggests that 'representative democracy is as paradoxical an oxymoron as our political language has ever produced.'<sup>92</sup>

Indeed, *all* of the constitutional restrictions – and not merely the constraint of representation – that 'democracies' place on the ability of citizens to determine the law preclude self-government. Quite simply, everything – both procedural and substantive – must be up for grabs. Insofar as electoral regulations, bills of rights and other constitutional provisions limit what, how or when citizens are able to decide, self-rule cannot be realised.

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<sup>91</sup> See J.J. Rousseau 'The Social Contract' in *The Social Contract and Discourses* (Edited by G.D.H. Cole, J.H. Brumfitt & J.C. Hall) (London: Everyman, 1973) Book III, Chapter 15.

<sup>92</sup> B.R. Barber *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press, 1984) xiv.

Among the constraints that must be expunged from the constitutions of 'democracies' if their citizens are to be autonomous is the norm that the will of the majority ought to prevail. Whenever some people are subject to the wishes of others, the former lack positive freedom. 'No one,' says Jack Lively, 'determines a decision who has voted against it.'<sup>93</sup> Yet the incompatibility of majority-rule and self-rule does not mean that each citizen should be entitled to veto any proposed law with which he or she disagrees. The introduction of a requirement of unanimity would simply replace one procedural restriction on decision-making with another and enable a lone citizen to thwart the wishes (and so the positive liberty) of the rest.

Hence, self-government requires complete agreement among citizens – which, of course, no procedural rule can ensure – on all changes to the law.<sup>94</sup> Every citizen must, as a matter of fact, agree to the creation of every legal norm if he or she is to be autonomous. Such unanimity is quite improbable and is palpably absent from contemporary 'democracies'. Yet self-determination requires even more.

Suppose that a man refuses to obey a legal duty to whose introduction he (and every other citizen) previously agreed. Were the state to force his

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<sup>93</sup> J. Lively *Democracy* (Oxford: Basil Blackwell, 1975) 17. See also W.N Nelson *On Justifying Democracy* (London: Routledge & Kegan Paul, 1980) 63; R. Harrison *Democracy* 5-6, 164-165.

<sup>94</sup> See J. Lively *Democracy* 24.



compliance with this norm, would he still rule himself? Robert Paul Wolff insists that he would because 'a man who is constrained only by the dictates of his own will is autonomous.'<sup>95</sup> But – as Zenon Bankowski points out<sup>96</sup> – Wolff is mistaken: someone to whom an option is not available due to human – including his or her own – behaviour cannot be autonomous. Self-determination implies that a citizen must be able to change his or her mind. It thus necessitates the agreement of every citizen to *existing* as well as new laws.

Given these requirements, the ideal of autonomy plainly does not validate the belief that moral agents have a content-independent ground for obedience to 'democratic' law. Indeed, positive liberty seems to justify anarchy instead.<sup>97</sup> The apparent correlation between autonomy and anarchy should not be surprising, however, given that anyone subject to government – of which 'democracies' are a species – is, by definition, not autonomous. Positive liberty, then, *cannot* – and not merely does not – support the 'democratic' process that many participants in moral practice regard as a content-independent reason to obey the law.

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<sup>95</sup> R.P. Wolff *In Defense of Anarchism* 23.

<sup>96</sup> See Z.K. Bankowski 'Don't Think About It: Legalism and Legality' *Rechtstheorie Beiheft* 15 (Berlin: Duncker & Humblot, 1993) 49, at 52.

<sup>97</sup> See W.N. Nelson *On Justifying Democracy* 63-64, 66; A. Weale *Democracy* (London: Macmillan, 1999) 63.

Yet the conclusion that citizens of 'democratic' states must be heteronomous relies on a particular view of agency. It supposes that citizens always behave individually and never together as a single body. Dworkin challenges this assumption. He denies that the conduct of a group must be understood as 'some function, rough or specific, of what the individual members of the group do on their own, that is, with no sense of doing something as a group.'<sup>98</sup> Instead, he says, their behaviour might be collective 'in a way that merges their separate actions into a further, unified, act that is together *theirs*.'<sup>99</sup> He thus proposes a 'communal' – as opposed to 'statistical' – account of democracy in which 'political decisions are taken by a distinct entity – the *people* as such – rather than any set of individuals one by one.'<sup>100</sup> Maybe his alternative conception of self-government vindicates the prevalent conviction that moral agents have a content-independent reason to obey legal rules whose source is 'democratic'.

But suspicion is likely to greet any attempt to defend 'democracy' with reference to a communal (rather than an individual) sense of autonomy. As

<sup>98</sup> R. Dworkin 'Equality, Democracy, and Constitution: We the People in Court' 28 *Alberta Law Review* (1990) 324, at 329. See also R. Dworkin *Freedom's Law: The Moral Reading of the American Constitution* 19.

<sup>99</sup> R. Dworkin *Freedom's Law: The Moral Reading of the American Constitution* 20. See also R. Dworkin 'Equality, Democracy, and Constitution: We the People in Court' 329.

<sup>100</sup> R. Dworkin 'Equality, Democracy, and the Constitution: We the People in Court' 330. See also R. Dworkin *Freedom's Law: The Moral Reading of the American Constitution* 20.

Dworkin acknowledges, the idea of communal agency seems to invoke 'a baroque metaphysics which holds that communities are fundamental entities in the universe and that individual human beings are only abstractions or illusions.'<sup>101</sup> For him, though, communal action depends 'not on the ontological primacy of the community, but on ordinary and familiar facts about the social practices that human beings develop.'<sup>102</sup> A community, he says, is 'created by and embedded in attitudes and practices.'<sup>103</sup> Hence, an orchestra acts as a distinct entity whenever its musicians 'recognize a personified unit of agency in which they no longer figure as individuals, but as components.'<sup>104</sup>

According to this 'practice' view of community, citizens might regard the decisions of the government – including those with which they disagree – as their own. Before they can do so, however, their membership of the political community must be 'genuine'.<sup>105</sup> They cannot rule themselves, says Dworkin, unless they belong to a community whose government treats them equally by

<sup>101</sup> R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass.: Harvard University Press, 2000) 225. See also R. Dworkin 'Equality, Democracy, and the Constitution: We the People in Court' 330; R. Dworkin *Freedom's Law: The Moral Reading of the American Constitution* 20.

<sup>102</sup> R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 225-226. See also R. Dworkin 'Equality, Democracy, and the Constitution: We the People in Court' 335.

<sup>103</sup> R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 226. See also 'Equality, Democracy, and the Constitution: We the People in Court' 335.

<sup>104</sup> R. Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 226. See also 'Equality, Democracy, and the Constitution: We the People in Court' 335-336; R. Dworkin *Freedom's Law: The Moral Reading of the American Constitution* 20.

<sup>105</sup> See R. Dworkin *Freedom's Law: The Moral Reading of the American Constitution* 22-23.

seeking to implement an honest – even if flawed – interpretation of the principles of ethical individualism.<sup>106</sup> Such a ‘true’ community satisfies the conditions of ‘moral membership’ that equal concern implies.<sup>107</sup> These requirements are of two kinds.

First, a ‘genuine’ community must meet ‘the genetic or geographical or other historical conditions identified by social practice as capable of constituting a fraternal community.’<sup>108</sup> That is, ‘true communities must be bare communities as well.’<sup>109</sup>

Second, there are certain ‘relational’ conditions that define ‘moral membership’. In a ‘genuine’ community, ‘each person must have an opportunity to make a difference in the collective decisions, and the force of his role – the magnitude of the difference he can make – must not be structurally fixed or limited in ways that reflect assumptions about his worth or talent or ability, or the soundness of his convictions or tastes.’<sup>110</sup> There must, then, be ‘universal suffrage and effective elections and representation’ plus ‘free speech and expression for all opinion, not just on formal political occasions, but in the

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<sup>106</sup> See my remarks in the previous section on Dworkin’s understanding of community.

<sup>107</sup> See R. Dworkin *Freedom’s Law: The Moral Reading of the American Constitution* 23-24.

<sup>108</sup> R. Dworkin *Law’s Empire* 201. See also R. Dworkin *Freedom’s Law: The Moral Reading of the American Constitution* 24.

<sup>109</sup> R. Dworkin *Law’s Empire* 201.

<sup>110</sup> R. Dworkin *Freedom’s Law: The Moral Reading of the American Constitution* 24. See also R. Dworkin ‘Equality, Democracy, and the Constitution: We the People in Court’ 337-338.

informal life of the community as well.<sup>111</sup> Moreover, 'the political process of a genuine community must express some bona fide conception of equal concern for the interests of all members, which means that political decisions that affect the distribution of wealth, benefits, and burdens must be consistent with equal concern for all.'<sup>112</sup> Finally, 'moral membership' requires 'liberal tolerance of unpopular sexual and personal morality.'<sup>113</sup> A 'genuine' community 'must not dictate what its [members] think about matters of political or moral or ethical judgment, but must, on the contrary, provide circumstances that encourage them to arrive at beliefs on these matters through their own reflective and finally individual conviction.'<sup>114</sup> In short, it must be 'integrated' rather than 'monolithic'.<sup>115</sup>

With reference to the 'relational' conditions, Dworkin separates 'true' from 'bare' communities. The latter are instances of the former in which every member has 'a *part* in any collective decision, a *stake* in it, and *independence* from

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<sup>111</sup> R. Dworkin *Freedom's Law: The Moral Reading of the American Constitution* 24-25. See also R. Dworkin 'Equality, Democracy, and the Constitution: We the People in Court' 338-339.

<sup>112</sup> R. Dworkin *Freedom's Law: The Moral Reading of the American Constitution* 25. See also R. Dworkin *Law's Empire* 200-201; R. Dworkin 'Equality, Democracy, and the Constitution: We the People in Court' 339-340.

<sup>113</sup> R. Dworkin 'Equality, Democracy, and the Constitution: We the People in Court' 341.

<sup>114</sup> R. Dworkin *Freedom's Law: The Moral Reading of the American Constitution* 26. See also R. Dworkin 'Equality, Democracy, and the Constitution: We the People in Court' 340.

<sup>115</sup> On this distinction, see R. Dworkin 'Equality, Democracy, and the Constitution: We the People in Court' 336.



it.<sup>116</sup> A government that satisfies these conditions, says Dworkin, is democratic. As with every other aspect of morality – justice, legitimacy and so forth – he thus interprets democracy according to the sovereign ideals of ethical individualism. The principles of equal importance and special responsibility yield the ‘relational’ conditions in terms of which he defines communal autonomy and, hence, democracy.

Given the moralistic understanding of community on which Dworkin’s alternative sense of positive liberty is contingent, I deny that it validates the popular claim that is the subject of the present section. My rejection of his communal reading of self-government as a justification for the belief that a moral actor has a content-independent reason to obey legal norms of ‘democratic’ pedigree follows inevitably from my commitment to pure analysis. Yet perhaps the ‘relational’ conditions *themselves* – as distinct from the moralistic version of autonomy in which Dworkin incorporates them – justify obedience to ‘democratic’ law. I conclude by suggesting that the principle of ‘participation’ has the potential to do so.

This principle – unlike those of ‘stake’ and ‘independence’, which involve substantive matters – concerns the law-making process. It imposes two

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<sup>116</sup> R. Dworkin *Freedom’s Law: The Moral Reading of the American Constitution* 24. See also R. Dworkin ‘Equality, Democracy, and the Constitution: We the People in Court’ 337.



requirements: an equal vote and an opportunity to take part in the discussions on which the informed exercise of that vote depends.<sup>117</sup> Only a 'democracy' whose departures from universal suffrage are justified – presumed or actual incapacity is an obvious explanation for the exclusion of a particular group of citizens from the franchise<sup>118</sup> – and whose electoral arrangements aim to ensure the equal worth of every vote – by providing for, say, majority-rule<sup>119</sup> – can fulfil the first requirement. To satisfy the second, a 'democratic' government must permit all citizens to speak freely and to form associations with one another.

The 'democracies' – there are certainly some – that comply with both requirements seem to further the ideals of equality and negative – as opposed to positive – liberty. Such governments – which do not include 'democracies' whose citizens are legally bound (and not merely entitled) to vote<sup>120</sup> – advance these two ideals by giving every citizen the same freedom (from human interference) to discuss and then to decide the substance of the law. But is their

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<sup>117</sup> On the relationship between these two elements of the principle, see M. Saward *The Terms of Democracy* (Cambridge: Polity Press, 1998) 89-90.

<sup>118</sup> But such incapacity does not account for the removal of the vote from criminals. On the justifiability of the ban on their participation in the law-making process, see H. Lardy 'Prisoner Disenfranchisement: Constitutional Rights and Wrongs' *Public Law* (2002) 524.

<sup>119</sup> On the connection between equality of input and majority-rule, see J. Waldron *Law and Disagreement* (Oxford: Clarendon Press, 1999).

<sup>120</sup> The morality of compulsory voting in Australia and elsewhere depends on the existence of a 'political obligation' in the broader sense that I mention (and then ignore) in the first part of this chapter. For discussion, see J.R. Lucas *Democracy and Participation* (Harmondsworth: Penguin, 1976) 160; C. Pateman *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970).

promotion of equality and negative liberty sufficient to furnish a moral agent with a content-independent reason to obey the legal duties that they impose? Although neither an equal vote nor freedom of speech is trivial – indeed, the mere symbolic value of the former is considerable<sup>121</sup> – perhaps more is necessary before a reason for obedience of this kind obtains.

Such a reason might, for instance, require the entitlement of every citizen to an education that enables him or her to participate effectively in the ‘democratic’ process.<sup>122</sup> According to Michael Saward, its existence might also depend on the universal provision of appropriate health-care:

[B]asic liberty rights [cannot] mean a great deal if citizens lack physical mobility, or if a lack of access to medical care and information is such that health problems become a factor so time- and energy-consuming that we can say that they are of “life-consuming” concern. To be able to “associate” and to “express” – to talk, travel, watch, listen, read, pay attention to issues of the day, form preferences and vote – citizens need a safety net of health care information and services that can contribute substantially to equality in the exercise of basic freedoms.<sup>123</sup>

Moreover, a ‘democracy’ that conforms to Dworkin’s principle of ‘participation’ might only supply moral agents with a content-independent reason to obey the law if the involvement of no citizen in the decision-making process is hampered

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<sup>121</sup> See J.R. Lucas *Democracy and Participation* 170.

<sup>122</sup> See R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* 148-150; M. Saward *The Terms of Democracy* 96.

<sup>123</sup> M. Saward *The Terms of Democracy* 98.

by his or her lack of wealth. Hence, material equality among citizens might be vital.<sup>124</sup>

Whether 'democracy' gives a moral actor a content-independent reason for obedience to legal norms is, ultimately, a matter of judgment.<sup>125</sup> Although I indicate some – after rejecting other – values that are relevant to this question, the need to ascertain their application in the particular circumstances of each case means that I do not answer it here. Even if – contrary to my intention – the foregoing consideration of pertinent ideals were exhaustive, then I would only be able to offer a definite conclusion following close scrutiny of the exact context in which the 'democratic' character of the state is alleged to provide a specific participant in moral practice with a content-independent reason to obey the law.

Suppose, though, that 'democracy' *does* warrant the lawful behaviour of a moral actor. Can this reason ever motivate his or her actual response to the law? Indeed, the same question might also be asked of a political obligation. Perhaps a moral agent must always treat the substance – and never the source or the mere existence – of a legal requirement as decisive. Given my commitment to value-pluralism, however, I need not suppose that justice inevitably trumps legitimacy. I thus allow for the possibility that the latter often prevails and claim

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<sup>124</sup> See M. Saward *The Terms of Democracy* 99.

<sup>125</sup> On the notion of judgment, see the penultimate section of chapter three.

that identification of the particular occasions on which it takes priority depends on exercising judgment in each case between the plurality of reasons for obedience and disobedience to the law that figure in my pure interpretation of moral practice. Although my analysis of these reasons is finished, their proper application remains to be determined.

## Political Reasons: Civil Disobedience

I now turn to the last of the three forms of behaviour that I examine in this thesis. Having argued against the need for moralistic analysis of human action and offered pure interpretations of two ways in which people respond to the law, my concern in this final chapter is the practice of civil disobedience. Once again, I reject an influential theory due to the moralistic methodology on which it depends and – with exclusive reference to the meta-theoretical norms of clarity, consistency, comprehensiveness and coherence – propose an alternative account. Before I introduce the reading of civil disobedience to which I object, however, consider the following events.

At dawn on 26 July 1999, twenty-eight members of Greenpeace U.K. entered a field of genetically-modified maize at Walnut Tree Farm in Norfolk. Dressed in distinctive white overalls and watched by four journalists, they began to cut down the crop. The farmers soon disturbed them. When the police arrived, the activists submitted to arrest and were then charged with theft and

criminal damage.<sup>1</sup> At their trial, they asserted their innocence. They said that their conduct was necessary to prevent damage to the environment and was, therefore, legally justified.<sup>2</sup> The jury found them not guilty of theft, but failed to reach a verdict on the charge of criminal damage. The activists were eventually acquitted of the latter offence at a subsequent retrial.<sup>3</sup>

On 18 March 2003, with the invasion of Iraq by the United States and her allies imminent, Dave Burgess and Will Saunders climbed to the top of the Opera House in Sydney and painted 'NO WAR' on the largest of the building's sails.<sup>4</sup> Will – a British citizen – had previously written to Tony Blair and to several newspapers to express his opposition to the proposed conflict. He had also taken part in numerous rallies and even booked a flight to Amman – which his friends persuaded him to cancel – with the intention of travelling to Iraq to act as a 'human shield'. Both Dave and Will believed that Australia's anticipated involvement in the attack – which they regarded as illegal and immoral – was contrary to the wishes of the majority of the population and that some form of illegal behaviour was the only means by which the two of them might be able to

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<sup>1</sup> See *The Guardian* 27, 28 July 1999.

<sup>2</sup> See *The Guardian* 4 April 2000.

<sup>3</sup> See *The Guardian* 21 September 2000.

<sup>4</sup> My account is drawn entirely from *Sydney Opera House: NO WAR* <<http://www.sydneyparahousenowarcleanupfund.org>>.



avert military action. According to Will, several criteria informed their decision to paint the Opera House:

It was paramount that there be no risk to other people and no permanent damage done; but otherwise we were keen to attract as much attention across the world as possible to the lack of support within Australia for the war. The Opera House was an obvious choice, because it is so visible and so closely identified with Australia, because it is tiled and hence certain to be cleanable and because we judged that we would be able to ascend it without any risk to others or any great risk to ourselves. [...] A banner was considered, but would have been very difficult to take up and affix and would have had very much less impact.<sup>5</sup>

Inevitably, Will and Dave were arrested. When tried, they claimed – with reference to s. 418 of the Crimes Act 1900 (NSW) – that their behaviour was in defence of others. The judge rejected their argument, however, and the jury found them guilty of maliciously damaging property.<sup>6</sup> They were sentenced to nine months of periodic detention and ordered to pay \$151,000 to the Sydney Opera House Trust as compensation for the cost of removing the paint. Their convictions and sentences were upheld on appeal.<sup>7</sup>

Are these instances of civil disobedience? If so, why? Is the fact that the protagonists sought publicity relevant? Does their submission to arrest have any significance? Is their insistence on the necessity of their actions important? And

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<sup>5</sup> W. Saunders 'Statement on the events of 18<sup>th</sup> March 2003' on *Sydney Opera House: NO WAR* <[http://www.sydneyoperahousenowarcleanupfund.org/april\\_statements.html](http://www.sydneyoperahousenowarcleanupfund.org/april_statements.html)>.

<sup>6</sup> For this offence, see s. 195(a) of the Crimes Act 1900 (NSW).

<sup>7</sup> *R v Burgess and Saunders* [2005] NSWCCA 52.

what about the particular goals that they sought to achieve? Do these matter? The answers to such questions are contingent on the definition of civil disobedience. Yet philosophical consensus on the nature of this concept is absent. 'In fact,' observes Robert Hall, 'the precise meaning of the phrase "civil disobedience" is one of the most disputed aspects of the topic.'<sup>8</sup> Prominent among the diverse accounts of this response to the law, however, is the conception advanced by John Rawls. His theory is my concern here.

My examination of civil disobedience has three parts. I start by dissecting Rawls's theory and locate a moralistic understanding of politics at its core. Then – in section two – I suggest an alternative interpretation of political practice in terms of which civil disobedience might – and, I insist, should – be defined. Finally, I indicate some sorts of facts that a value-pluralist is likely to treat as relevant when judging the morality of illegal behaviour that is political in this pure sense.

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<sup>8</sup> R.T. Hall *The Morality of Civil Disobedience* (New York: Harper & Row, 1971) 13. See also H.A. Bedau 'Civil Disobedience and Personal Responsibility for Injustice' 54 *The Monist* (1970) 517, at 517; J.G. Murphy 'Introduction' in J.G. Murphy (ed.) *Civil Disobedience and Violence* (Belmont, CA: Wadsworth, 1971) 1.

# I

According to Rawls, civil disobedience is 'a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.'<sup>9</sup> In other words, he regards civil disobedience as an open and peaceful breach of a legal obligation that normally seeks to modify the conduct of the state and whose motive is political as well as conscientious. Although he cites Hugo Bedau's formulation as the template for his account, the definition that he purports to copy does not state that civil disobedience must be political.<sup>10</sup> For Rawls, however, this attribute is fundamental. I reveal its centrality among the various aspects of his theory by looking at each of them in turn.

I begin with the need that Rawls perceives for an act of civil disobedience to be 'contrary to the law'. This condition appears straightforward for the reason that Bedau identifies: 'Compliance, even if done under open protest, and after efforts to avert or nullify the law, is not civil disobedience – for nothing illegal

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<sup>9</sup> J. Rawls *A Theory of Justice* (Revised edition) (Oxford: Oxford University Press, 1999) 320. See also J. Rawls 'The Justification of Civil Disobedience' in *Collected Papers* (Edited by S. Freeman) (Cambridge, Mass.: Harvard University Press, 1999) 181.

<sup>10</sup> H.A. Bedau 'On Civil Disobedience' 58 *Journal of Philosophy* (1961) 653, at 661. See also H.A. Bedau 'Civil Disobedience and Personal Responsibility for Injustice' 519.

has been done, no law has been *disobeyed*.<sup>11</sup> Yet the requirement of illegality is more complicated than it seems and generates at least a couple of difficulties to which solutions are essential. Since Rawls discusses neither of them, I venture to do so on his behalf.

The first problem is to identify a breach of the law. Compare the outcomes of the two cases with which this chapter begins. Whereas the members of Greenpeace were ultimately exonerated, the convictions of Dave Burgess and Will Saunders were confirmed on appeal. Does this mean that only the latter contravened the law and that the behaviour of the former cannot be described as civil disobedience? Michael Bayles would say 'yes'. He supposes that the legality of an action depends on the subsequent judgment of a court.<sup>12</sup> Given the potential for courts to make mistakes, however, I reject his assumption and claim instead that the lawfulness of conduct must be determined at the time of its performance with reference to prevailing norms. I thus agree with Hall: 'In speaking of civil disobedience as an illegal action, it is best to define as illegal an act for which the agent is liable to arrest, regardless of whether he actually is arrested or not and of whether he is ultimately found

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<sup>11</sup> H.A. Bedau 'Introduction' in H.A. Bedau (ed.) *Civil Disobedience in Focus* (London: Routledge, 1991) 5. See also H.A. Bedau 'On Civil Disobedience' 653-654; C. Cohen *Civil Disobedience: Conscience, Tactics, and the Law* (New York: Columbia University Press, 1971) 4.

<sup>12</sup> See M. Bayles 'The Justifiability of Civil Disobedience' 24 *Review of Metaphysics* (1970) 3, at 4.

innocent or guilty.<sup>13</sup> If this is correct and later proceedings in court have no impact on whether the requirement of illegality is satisfied, then both or neither of my two cases might be instances of civil disobedience.

Suppose, though, that the members of Greenpeace and the two anti-war protestors *did* violate the law. Of what – if any – significance is the fact that they argued to the contrary at their respective trials? Do their submissions indicate that they did not mean to act illegally? If so, must one infer that their conduct was not civil disobedience? The problem of intentionality is the second complication that the requirement of illegality generates.

My solution to this difficulty follows from my general understanding of obedience and disobedience to the law. In the first section of chapter one, I classify these actions as deliberate responses to primary rules. Consequently, I hold that an actor does not commit civil disobedience unless he or she plans to contravene a legal duty. As Carl Cohen acknowledges, an action can only constitute civil disobedience if '[the actor] not only breaks the law, but does so knowingly and deliberately.'<sup>14</sup>

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<sup>13</sup> R.T. Hall *The Morality of Civil Disobedience* 19.

<sup>14</sup> C. Cohen *Civil Disobedience: Conscience, Tactics, and the Law* 7. See also M. Bayles 'The Justifiability of Civil Disobedience' 4; P. Harris 'Introduction: The Nature and Moral Justification of Civil Disobedience' in P. Harris (ed.) *Civil Disobedience* (Lanham, Maryland: University of America Press, 1989) 6.

Since conduct in whose lawfulness the actor believes cannot be a deliberate breach of a legal obligation, then civil disobedience is distinct from behaviour that seeks to provoke a 'test-case'. As Sidney Hook says, '[a]n action launched in violation of a local law or ordinance, and undertaken to test it, on the ground that the law itself violates state or federal law, or launched in violation of a state law in the sincerely held belief that the state law outrages the Constitution, the supreme law of the land, is not civilly disobedient.'<sup>15</sup> Given this distinction, must one conclude from the legal arguments of the protestors in my examples that they sought to 'test' the law and did not engage in civil disobedience? I do not think so. Just as one must determine the legality of an action at the moment of its performance, one must ascertain the legal convictions of the actor then too. Yet one cannot assume that his or her sense of the law at that time is accurately represented by the submissions that he or she subsequently makes to a court. Numerous factors – including the prospect of punishment – might cause a discrepancy between these views. Notwithstanding their later arguments, therefore, the activists in my two cases might have committed civil disobedience.

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<sup>15</sup> S. Hook 'Social Protest and Civil Disobedience' in J.G. Murphy (ed.) *Civil Disobedience and Violence* (Belmont, CA: Wadsworth, 1971) 54-55. See also D. Rucker 'The Moral Grounds of Civil Disobedience' 76 *Ethics* (1966) 142, at 143. Contrast P. Harris 'Introduction: The Nature and Moral Justification of Civil Disobedience' 6.



Consider, next, the requirement of publicity. According to Rawls, '[civil disobedience] is engaged in openly with fair notice; it is not covert or secretive.'<sup>16</sup> He explains the need for transparency by supposing that civil disobedience must be conscientious and political: 'One may compare it to public speech, and being a form of address, an expression of profound and conscientious political conviction, it takes place in the public forum.'<sup>17</sup> Because civil disobedience is conscientious and political, says Rawls, it is necessarily public.

But *what* must be public? Do people need to know who is responsible for an act of civil disobedience? Or need they be aware of no more than its occurrence? Must both the actions and the identities of the protagonists in my two examples be apparent? Paul Harris declares that 'civil disobedience must be public in two senses: the act itself is not concealed, and the agent does not try to hide his or her own identity.'<sup>18</sup> That Rawls concurs is demonstrated by his refusal to allow that civil disobedience might be violent.

Although Rawls does not define violence, he nevertheless regards it as inconsistent with civil disobedience in two ways. First, he says, it contradicts the

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<sup>16</sup> J. Rawls *A Theory of Justice* 321. See also M. Bayles 'The Justifiability of Civil Disobedience' 4; S.M. Brown 'Civil Disobedience' 58 *Journal of Philosophy* (1961) 669, at 670.

<sup>17</sup> J. Rawls *A Theory of Justice* 321. See also H.A. Bedau 'Introduction' 6-7.

<sup>18</sup> P. Harris 'Introduction: The Nature and Moral Justification of Civil Disobedience' 7.

notion that this type of behaviour conveys a political and conscientious message: 'To engage in violent acts likely to injure and to hurt is incompatible with civil disobedience as a mode of address.'<sup>19</sup> Hence, he relies on the allegedly conscientious and political character of civil disobedience in support of his assertion that such a response to the law cannot be violent. Second, he maintains that civil disobedience expresses fidelity to law and this demands an absence of violence, a 'willingness to accept the legal consequences of one's conduct.'<sup>20</sup> He insists that an individual who fails to surrender to arrest and punishment does not commit civil disobedience.<sup>21</sup> For Rawls, therefore, the identity of the agent as well as the act of disobedience must be made public.

On these two grounds, Rawls distinguishes civil disobedience from violence. Yet the second ground is no more than an elaboration of the first. As indicated by his admission that 'fidelity to law helps to establish [...] that the act is indeed politically conscientious and sincere',<sup>22</sup> he treats submission to arrest and punishment as mere evidence of a conscientious political belief. As with the

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<sup>19</sup> J. Rawls *A Theory of Justice* 321. See also J. Rawls 'The Justification of Civil Disobedience' 182.

<sup>20</sup> J. Rawls *A Theory of Justice* 322. See also J. Rawls 'The Justification of Civil Disobedience' 182.

<sup>21</sup> On this, see P. Harris 'Introduction: The Nature and Moral Justification of Civil Disobedience' 14; B. Lang 'Civil Disobedience and Nonviolence: A Distinction With a Difference' 80 *Ethics* (1970) 156, at 157.

<sup>22</sup> J. Rawls *A Theory of Justice* 322. See also J. Rawls 'The Justification of Civil Disobedience' 182.

requirement of publicity, then, the condition of nonviolence follows from Rawls's opinion that civil disobedience is conscientious and political. But how does he understand this pair of attributes?

Rawls seems to accept Bedau's view that a breach of the law is conscientious when performed for a moral reason.<sup>23</sup> To avoid the confusion of civil disobedience with 'conscientious objection', however, Rawls limits the moral principles on which the former can be based. He states that civil disobedience must 'appeal to a commonly shared conception of justice, whereas conscientious refusal may have other grounds.'<sup>24</sup> Civil disobedience is, he says, always political:

[It] is a political act not only in the sense that it is addressed to the majority that holds political power, but also because it is an act guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally. In justifying civil disobedience one does not appeal to principles of personal morality or to religious doctrines, though these may coincide with and support one's claims; and it goes without saying that civil disobedience cannot be grounded solely on group or self-interest. Instead one invokes the commonly shared conception of justice that underlies the political order.<sup>25</sup>

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<sup>23</sup> See H.A. Bedau 'On Civil Disobedience' 659.

<sup>24</sup> J. Rawls *A Theory of Justice* 324. See also J. Rawls 'The Justification of Civil Disobedience' 181.

<sup>25</sup> J. Rawls *A Theory of Justice* 321.

According to Rawls, civil disobedience is directed at the governing majority and indicates that 'the conditions of social cooperation are not being honored.'<sup>26</sup> It occurs only in a community that is 'nearly just':

[T]his implies that [the society] has some form of democratic government, although serious injustices may nevertheless exist. In such a society [...] the principles of justice are for the most part publicly recognized as the fundamental terms of willing cooperation among free and equal persons. By engaging in civil disobedience one intends, then, to address the sense of justice of the majority and to serve fair notice that in one's sincere and considered opinion the conditions of free cooperation are being violated.<sup>27</sup>

Civil disobedience, says Rawls, is 'a final device to maintain the stability of a just constitution.'<sup>28</sup> He claims that it seeks to correct deviations from the principles of justice to which free and equal people – those in the 'original position'<sup>29</sup> – would agree. These principles, he says, give each person the same fundamental liberties and permit social and economic inequalities only to the extent that they benefit the worst-off and are associated with positions to which everyone has a fair chance of being appointed.<sup>30</sup> Rawls's version of civil disobedience supposes a democratic society in which these liberal principles are

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<sup>26</sup> J. Rawls 'The Justification of Civil Disobedience' 181.

<sup>27</sup> J. Rawls *A Theory of Justice* 335.

<sup>28</sup> J. Rawls *A Theory of Justice* 337.

<sup>29</sup> I discuss this hypothetical scenario in the third section of chapter three. For an introduction to it, see J. Rawls *A Theory of Justice* 10-19.

<sup>30</sup> For a concise statement of these principles and the relationship between them, see J. Rawls *A Theory of Justice* 266.

shared. The agreement that he assumes, though, is not necessarily perfect. He allows for 'considerable differences in citizens' conceptions of justice provided that these conceptions lead to similar political judgments.'<sup>31</sup> In short, he regards an 'overlapping consensus' as sufficient.<sup>32</sup>

For Rawls – as his later work verifies<sup>33</sup> – politics takes place within the context of agreement between democratic citizens on his brand of liberalism. Given its reliance on the theory of justice that he favours, his interpretation of political practice is moralistic. It makes sense of such behaviour in moral terms. It is, moreover, the crucial element in Rawls's account of civil disobedience. As he acknowledges, his understanding of this response to the law 'rests solely upon a conception of justice' and '[e]ven the features of publicity and nonviolence are explained on this basis.'<sup>34</sup> With the exception of the requirement of illegality, his entire definition of civil disobedience follows from his liberal interpretation of political action. I confirm this dependence by examining the remaining aspect of his theory.

Rawls states that civil disobedience generally aims at altering the law or policies of the government. This, of course, 'does not require that the civilly

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<sup>31</sup> J. Rawls *A Theory of Justice* 340.

<sup>32</sup> See J. Rawls *A Theory of Justice* 340.

<sup>33</sup> See especially J. Rawls *Political Liberalism* (New York: Columbia University Press, 1996).

<sup>34</sup> J. Rawls *A Theory of Justice* 337.

disobedient act breach the same law that is being protested.<sup>35</sup> He acknowledges that civil disobedience might be either direct or indirect. It is direct if it breaches the legal norm of whose injustice the actor wishes to make the majority aware and indirect if the rule with which the actor fails to comply is not the law that he or she wants the government to change.<sup>36</sup> Rawls notes that direct civil disobedience often cannot be performed. In some instances, he says, 'there is no way to violate the government's policy directly, as when it concerns foreign affairs, or affects another part of the country.'<sup>37</sup> Moreover – since only duty-imposing laws can be disobeyed – civil disobedience must be indirect whenever it seeks to modify a secondary rule of the legal system.<sup>38</sup>

Yet Rawls limits the laws which civil disobedience – whether direct or indirect – might try to change. Civil disobedience, for him, is not about 'transforming or even overturning an unjust and corrupt system.'<sup>39</sup> It assumes the legitimacy of the constitution and is, therefore, not concerned with revolution. Carl Cohen – among other theorists – agrees:

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<sup>35</sup> J. Rawls *A Theory of Justice* 320. See also E. Van Den Haag *Political Violence and Civil Disobedience* (New York: Harper & Row, 1972) 3.

<sup>36</sup> See C. Cohen *Civil Disobedience: Conscience, Tactics, and the Law* 52; P. Harris 'Introduction: The Nature and Moral Justification of Civil Disobedience' 27.

<sup>37</sup> J. Rawls *A Theory of Justice* 320. See also C. Cohen *Civil Disobedience: Conscience, Tactics, and the Law* 55-56.

<sup>38</sup> I discuss H.L.A. Hart's distinction between primary and secondary rules in the first section of chapter one.

<sup>39</sup> J. Rawls *A Theory of Justice* 319.



It is important to distinguish civil disobedience from revolution. The revolutionary seeks to overthrow the established government; he repudiates the system of laws, denying their legitimacy and their rightful authority over him. The civil disobedient does not do this. He deliberately violates one law whose technical legitimacy he admits. He accepts and tacitly approves of the system of laws in general, recognizing their rightful authority over all citizens of the polity, himself included. In short, the civil disobedient consciously acts within the frame of constituted authority, while the rebel seeks to demolish that frame, or to escape from it.<sup>40</sup>

As with the conditions of publicity and nonviolence, Rawls's rejection of revolution follows from the moralistic interpretation of politics according to which he constructs his definition of civil disobedience. If this form of dissent aims to uphold the liberal principles by which a democratic society is regulated, it cannot attempt to discard those principles. Revolution is simply not compatible with bolstering a constitution that is largely just.

Rawls thus portrays civil disobedience as the defence of liberal democracy by illegal means. He insists that neither its occurrence nor the identity of its perpetrator is unknown. He also requires the person responsible to act peacefully and to accept any state-imposed sanctions for his or her

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<sup>40</sup> C. Cohen 'Defending Civil Disobedience' 54 *The Monist* (1970) 469, at 470. See also C. Bay 'Civil Disobedience: Prerequisite for Democracy in Mass Society' in J.G. Murphy (ed.) *Civil Disobedience and Violence* (Belmont, CA: Wadsworth, 1971) 78; M. Bayles 'The Justifiability of Civil Disobedience' 4-5; C. Cohen *Civil Disobedience: Conscience, Tactics, and the Law* 42, 44; A. Fortas *Concerning Dissent and Civil Disobedience* (New York: Signet, 1970) 59-60; R.T. Hall *The Morality of Civil Disobedience* 20; J.G. Murphy 'Introduction' 1-2; J. Raz *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 265; D. Rucker 'The Moral Grounds of Civil Disobedience' 143; E. Van Den Haag *Political Violence and Civil Disobedience* 6.

violation of the law. Yet what are the implications of his moralistic account? What sort of behaviour does Rawls classify as civil disobedience?

Consider, once again, the two cases with which this chapter begins. Even if those involved – the Greenpeace activists and the two anti-war campaigners – deliberately broke the law,<sup>41</sup> their behaviour does not satisfy every condition that Rawls specifies. Although their conduct was public in both of the requisite senses and arguably peaceful – the latter depends on whether Rawls's (unstated) conception of violence includes damage to property – their arguments in court do not suggest that they were willing to be punished for their actions. More significantly, though, they did not aim to correct departures from the liberal principles of justice to which free and equal people would supposedly agree.

On the (rather generous) assumption that the governments of the United Kingdom in 1999 and Australia in 2003 complied sufficiently with these principles to be labelled 'nearly just', neither the members of Greenpeace nor Dave Burgess and Will Saunders were motivated by a wish to remedy breaches of such norms. They sought changes to state-policy in relation to matters – trials of genetically-modified crops and the military invasion of another state – on

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<sup>41</sup> See my remarks at the start of the present section on the application of the proviso of illegality to these examples.

which these principles are silent. The liberal values on which Rawls's theory of civil disobedience supposes agreement are concerned with the distribution among citizens of 'primary goods' such as liberties and wealth.<sup>42</sup> Their anthropocentrism – their exclusive focus on the entitlements of humans – means that they are not relevant to the environmental objectives of the Greenpeace activists. Given their assumed application within – but not beyond – particular communities, moreover, Dave Burgess and Will Saunders could not have relied on them either. Indeed, their restricted scope implies – notwithstanding Rawls's apparent belief to the contrary<sup>43</sup> – that alteration of the government's foreign policy can *never* be the goal of civil disobedience. Although Rawls elsewhere suggests norms for the regulation of international relations, they differ from – even if they might be added to – the specific principles in whose terms he defines civil disobedience.<sup>44</sup>

The moralistic conception of politics with reference to which Rawls construes the practice of civil disobedience thus limits the extent to which he detects engagement in it. Actually, says Vinit Haksar, his liberal preconditions are likely to result in the complete disappearance of this response to the law

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<sup>42</sup> See J. Rawls *A Theory of Justice* 54-55.

<sup>43</sup> Recall his comments – see J. Rawls *A Theory of Justice* 320 – on situations in which civil disobedience must be indirect.

<sup>44</sup> See J. Rawls 'The Law of Peoples' in *The Law of Peoples, with 'The Idea of Public Reason Revisited'* (Cambridge, Mass.: Harvard University Press, 1999).

from his point of view.<sup>45</sup> By confining civil disobedience to actions that both take place in and seek to uphold the shared ideals of a liberal society, Haksar believes that Rawls renders it superfluous. If the members (and, hence, the government) of a society really are committed to the promotion of justice, says Haksar, then why would one of them need to breach a legal norm (and risk punishment) to bring some injustice to the attention of – so that the law might be amended by – the rest? Given the lack of an obvious answer to this question, then Rawls's 'political moralism' – to borrow an expression from Bernard Williams<sup>46</sup> – might cause the practice of civil disobedience to vanish from his sight altogether.

For a pure theorist – whose methodology I endorse in chapter one and practise throughout this thesis – the serious (and potentially fatal) checks that Rawls's liberalism impose on his interpretation of civil disobedience cause him to neglect the beliefs of participants in the practice that he describes and, therefore, to flout the meta-theoretical requirement of comprehensiveness. Many commentators point out the degree to which the conception of politics that is central to his account of this response to the law diverges from common

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<sup>45</sup> For this argument, see V. Haksar *Civil Disobedience, Threats and Offers: Gandhi and Rawls* (Delhi: Oxford University Press, 1986) 15-18.

<sup>46</sup> B. Williams 'Realism and Moralism in Political Theory' in *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Selected, edited, and with an introduction by Geoffrey Hawthorn) (Princeton: Princeton University Press, 2005) 2.

understandings of such behaviour. According to Williams, for instance, Rawls does not pay sufficient attention 'to what is platitudinously politics'.<sup>47</sup>

The lack of fit with ordinary convictions is not the only ground on which a pure theorist objects to the liberal interpretations of political action in general and civil disobedience in particular that Rawls proposes. A philosopher of this sort is also troubled by the imprecision of his theories. By making sense of these practices in moral terms, Rawls brings together questions of meaning and morality on whose separation the meta-theoretical value of clarity insists. The absence of violence from his definitions of politics and civil disobedience, for example, distorts moral consideration of attempts to reform the law by violent means. As Bayles notes, it obscures a moral question that 'should be squarely faced'.<sup>48</sup>

In the next section, I offer interpretations of politics and civil disobedience that are, I submit, both clearer and more comprehensive than those advanced by Rawls. I start by articulating a pure conception of politics from which I then derive an alternative theory of civil disobedience. The former

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<sup>47</sup> B. Williams 'Realism and Moralism in Political Theory' 13. For similar observations, see also C. Mouffe *The Return of the Political* (London: Verso, 2005) chapter three; G. Newey *After Politics: The Rejection of Politics in Contemporary Liberal Philosophy* (Basingstoke: Palgrave, 2001).

<sup>48</sup> M. Bayles 'The Justifiability of Civil Disobedience' 5. See also R.T. Hall *The Morality of Civil Disobedience* 15; P. Harris 'Introduction: The Nature and Moral Justification of Civil Disobedience' 12.

originates in the work of Carl Schmitt. Although scepticism is inevitable about my reliance on a theorist whose links to Nazism are well-known, only the moralistic approach to philosophy that I eschew could justify a complete refusal to engage with his thought.<sup>49</sup>

## II

Schmitt aims to identify the peculiar character of politics. 'A definition of the political,' he says, 'can be obtained only by discovering and defining the specifically political categories.'<sup>50</sup> According to Schmitt, politics must 'rest on its own ultimate distinction, to which all action with a specifically political meaning can be traced.'<sup>51</sup> He identifies this distinction as that between friend and enemy.<sup>52</sup> The latter has a more narrow meaning than one might expect. For Schmitt, '[a]n enemy exists only' when, at least potentially, one fighting collectivity of people confronts a similar collectivity.'<sup>53</sup> He defines an enemy in

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<sup>49</sup> For a similar point, see C. Mouffe *On the Political* (London: Routledge, 2005) 5.

<sup>50</sup> C. Schmitt *The Concept of the Political* (Translated by G. Schwab) (Chicago: University of Chicago Press, 1996) 25.

<sup>51</sup> C. Schmitt *The Concept of the Political* 26.

<sup>52</sup> C. Schmitt *The Concept of the Political* 26.

<sup>53</sup> C. Schmitt *The Concept of the Political* 28.



terms of 'the ever present possibility of combat.'<sup>54</sup> War, he says, is the most extreme consequence of enmity.<sup>55</sup>

By means of the distinction between friend and enemy, Schmitt declares that opposition is the core of politics.<sup>56</sup> Yet Schmitt fails to explain the connection that he makes between enmity and war. He does not account for the dependence of the distinction between friend and enemy (and so politics) on the prospect of combat. There is, however, an obvious reason: war is simply the most extreme method by which one group of people can attain or preserve power over another group (that is, the enemy). As Max Weber states: 'The decisive means for politics is violence.'<sup>57</sup>

Hence, I suggest that politics is about the acquisition or maintenance of the ability to get a community to act in a particular manner. Possession of this sort of power is the goal of politics. But are communities the only agents that desire it? To hold – as Schmitt does – that political action must be collective ignores the fact that individual persons might also be motivated by a wish for

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<sup>54</sup> C. Schmitt *The Concept of the Political* 32.

<sup>55</sup> C. Schmitt *The Concept of the Political* 33.

<sup>56</sup> See B. Williams 'From Freedom to Liberty: The Construction of a Political Value' in *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Selected, edited, and with an introduction by Geoffrey Hawthorn) (Princeton: Princeton University Press, 2005) 78.

<sup>57</sup> M. Weber 'Politics as a Vocation' in *From Max Weber: Essays in Sociology* (Translated, edited and with an introduction by H.H. Gerth & C. Wright Mills) (London: Routledge & Kegan Paul, 1948) 121.

power over a group of people. I thus drop Schmitt's assumption that political agency is always communal. By doing so, moreover, I preclude a nationalist reading of the friend-enemy distinction and avoid a possible objection to my account.<sup>58</sup>

What, though, about the agent over whom power is sought? Must politics be limited to the acquisition or continuation of power over a group? Or might this practice be concerned with the attainment or protection of the capacity to effect the behaviour of an individual person as well? Such an extension would no doubt introduce a neat symmetry into my theory, but it would not match ordinary speech. It would bring within the scope of politics too much that is seldom – if ever – classified as political. So I reject it. Moreover, I believe – for the same meta-theoretical reason of comprehensiveness – that the association over whom power is coveted must have some normative structure – which need not be a legal system – that regulates the conduct of members. Whenever I refer to a group, I assume that a framework of this type exists.

Politics, then, is any activity that seeks power over a community.<sup>59</sup>

Behaviour of this sort is not necessarily confined to specific institutions – say,

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<sup>58</sup> For a statement of this potential critique, see D. Dyzenhaus *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press, 1997) chapter two.

<sup>59</sup> Note that the actor need not be a member of the community.

parliaments – but might take place in numerous locations. It is open-ended too. 'It does not describe its own substance,' says Schmitt.<sup>60</sup> My conception of politics does not discriminate between the different reasons for which an agent might want power over a group of people and so applies equally to an actor for whom power of this kind is intrinsically desirable and another for whom this ability is no more than a means for the attainment of a further goal.<sup>61</sup> Participants in political practice whose aspiration for power over a community is instrumental are almost certain to have different reasons for wishing to acquire or maintain it. Some of them might treat a moral reason as authoritative, whereas others might share Niccolo Machiavelli's belief that the ultimate justification is 'glory and riches'.<sup>62</sup> The nature of this further objective, however, has no bearing on whether their conduct is political. The latter depends solely on the fact that each of them strives for power over a community.

Power – in which Rawls has no apparent interest<sup>63</sup> – is thus central to my pure account of politics. Yet one might object that this notion cannot fix the limits of politics with sufficient precision. Indeed, Peter Morriss responds to the

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<sup>60</sup> C. Schmitt *The Concept of the Political* 38. See also B. Williams 'From Freedom to Liberty: The Construction of a Political Value' 77.

<sup>61</sup> See M. Weber 'Politics as a Vocation' 78.

<sup>62</sup> N. Machiavelli *The Prince* (Translated by G. Bull) (Harmondsworth: Penguin, 1961) 78-79. For commentary, see Q. Skinner *Machiavelli* (Oxford: Oxford University Press, 1981) 29-30.

<sup>63</sup> On the neglect of power by liberalism, see C. Mouffe *The Return of the Political* 49, 140-141; G. Newey *After Politics: The Rejection of Politics in Contemporary Liberal Philosophy* 8.

suggestion that power is the subject-matter of political science by pointing out that 'the study of power as the ability to effect [would not] make much sense as a discipline: one's powers are far too varied for even the most systematic synthesist to say anything general about them.'<sup>64</sup> But I do not claim that political practice is simply about power. Rather, I define this activity in terms of power of one sort, namely, the ability to determine the behaviour of a group of people. As Morriss notes: '[P]olitical power is a subcategory of power: the adjective is not redundant.'<sup>65</sup> There is a difference between the species of power sought by, first, a person who visits the gym regularly because he or she desires the capacity to lift a certain weight and, second, someone who paints 'NO WAR' on the Sydney Opera House in an attempt to avert an imminent war. Only the second of these people wants *political* power.

Of course, not all political action is effective. An actor might lack judgment and so fail to achieve or maintain the power over a collectivity for which he or she yearns.<sup>66</sup> Political success depends on the adoption of appropriate means and these vary according to the circumstances. As

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<sup>64</sup> P. Morriss *Power: A Philosophical Analysis* (Manchester: Manchester University Press, 1987) 44-45.

<sup>65</sup> P. Morriss *Power: A Philosophical Analysis* 45. This point is not affected by the fact that Morriss has a rather different understanding of politics: see 45-46.

<sup>66</sup> For discussion, see I. Berlin 'Political Judgement' in *The Sense of Reality: Studies in Ideas and their History* (Edited by H. Hardy, with an introduction by P. Gardiner) (London: Pimlico, 1997).

Machiavelli observes: '[T]he one who adapts his policy to the times prospers, and [...] the one whose policy clashes with the demands of the times does not.'<sup>67</sup>

Machiavelli's advice that one 'should appear a man of compassion, a man of good faith, a man of integrity, a kind and a religious man'<sup>68</sup> supposes that such characteristics are highly regarded by the community over which one wishes to have power. The attainment of political power is contingent on the beliefs of this group of people.<sup>69</sup> If they consider honesty to be a virtue, one should not appear to lie; if they prize wit, one should tell jokes;<sup>70</sup> if they believe in higher public spending, one should not propose cuts; if they approve of intelligence, one should seem clever; if they think that the law ought never to be broken, one should always appear to be law-abiding; and, if they dislike politics, one should not be seen to behave politically.<sup>71</sup> A competent political actor is sensitive to their attitudes. He or she challenges their opinions only insofar as their other convictions permit him or her to do so. As a result, he or she is trusted by and has power over them.

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<sup>67</sup> N. Machiavelli *The Prince* 78. See Q. Skinner *Machiavelli* 38.

<sup>68</sup> N. Machiavelli *The Prince* 56.

<sup>69</sup> On this, see K. Minogue *Politics: A Very Short Introduction* (Oxford: Oxford University Press, 1995) 72.

<sup>70</sup> See K. Minogue *Politics: A Very Short Introduction* 66.

<sup>71</sup> In this regard, note Henry Kissinger's insistence that he was not influenced by the work of Machiavelli. For discussion, see Q. Skinner *Machiavelli* 1.

On my account, then, politics is a distinct form of behaviour whose objective is the ability to control a group of people. With its emphasis on conflict and power, I believe that my understanding satisfies the quartet of meta-theoretical ideals – especially those of comprehensiveness and clarity – to which I express my commitment in chapter one more fully than the liberal conception of Rawls. Hence, I recommend the deletion of his version of politics from the meaning of civil disobedience and the insertion of mine. Following this substitution, civil disobedience is a deliberate breach of a legal obligation that is motivated by a desire for power over a community. To grasp the implications of this revision, consider the impact of my interpretation of politics on the other features that Rawls includes in his theory of civil disobedience.

Take, first, the requirement of publicity. Rawls includes it in his definition because he supposes that civil disobedience is an appeal to shared liberal values. Yet publicity is no longer a necessary attribute of this response to the law. Instead, it is merely a precondition for *effectiveness*.<sup>72</sup> If political power is to be acquired or retained, an act of civil disobedience must be apparent to the relevant members of the community over whose behaviour the actor seeks control. Both the members of Greenpeace and the anti-war campaigners realised

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<sup>72</sup> See H.A. Bedau 'On Civil Disobedience' 655; C. Cohen *Civil Disobedience: Conscience, Tactics, and the Law* 16; J. Raz *The Authority of Law: Essays on Law and Morality* 265.



this. Whereas the former wore distinctive clothing and invited four journalists to witness their actions, the latter chose to graffiti the Opera House because they were – in the words of Will Saunders – ‘keen to attract as much attention across the world as possible to the lack of support within Australia for the war.’<sup>73</sup> No one other than a political incompetent – someone whose political judgment is altogether deficient – would engage in secret civil disobedience. As Bedau states: ‘There would clearly be something odd about a policeman’s reporting that he had surprised several persons in the act of committing civil disobedience or about employing detectives to root out conspiracies to commit civil disobedience.’<sup>74</sup> Publicity is crucial if civil disobedience is to be successful. But civil disobedience can nevertheless occur without it.

Rawls also holds – again, for liberal reasons – that civil disobedience must be peaceful. On my revised view, however, violence is compatible with this response to the law. An infringement of a primary norm whose ultimate aim is power over a community can be violent. Yet one might object that the definition of civil disobedience now extends to the actions of terrorists and is, therefore, too wide. Notwithstanding everyday disagreement about the nature of terrorism, I agree that the meta-theoretical value of comprehensiveness

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<sup>73</sup> W. Saunders ‘Statement on the events of 18<sup>th</sup> March 2003’.

<sup>74</sup> H.A. Bedau ‘On Civil Disobedience’ 655.

requires a distinction between these two forms of behaviour and so exclude from the scope of civil disobedience any conduct – violent or otherwise – that seeks to create terror.<sup>75</sup> Whenever I refer to an action that tries to acquire or to maintain power over a community by consciously illegal means, I assume that the actor does not intend to terrify the people whose behaviour he or she wants the ability to effect.

Hence – contrary to Rawls and many other theorists – I deny that civil disobedience must be peaceful. The potential for violence to secure political power is, though, another matter. The attitudes of the members of the group over which power is sought are crucial to the question of effectiveness. In emphasising the tactical importance of nonviolence, Cohen supposes that people are impressed by it.<sup>76</sup> Yet his doubts about violence as a political strategy have no impact whatsoever on the meaning of civil disobedience. A violent act is an instance of civil disobedience if the actor wishes to acquire or maintain political power by an intentional breach of the law – regardless of whether he or she succeeds. To the (rather superficial) objection that his or her behaviour does

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<sup>75</sup> For an excellent introduction to this topic, see C. Gearty *Terrorism* (London: Phoenix, 1997).

<sup>76</sup> See C. Cohen *Civil Disobedience, Conscience, Tactics, and the Law* 24. See also D. Miller 'The Use and Abuse of Political Violence' 32 *Political Studies* (1984) 401, at 414; H. Zinn 'A Fallacy on Law and Order: That Civil Disobedience Must Be Absolutely Nonviolent' in J.G. Murphy (ed.) *Civil Disobedience and Violence* (Belmont, California: Wadsworth, 1971) 110-111.

not deserve to be called 'civil',<sup>77</sup> Hall provides a convincing response: "'Civil disobedience" no more means disobedience in a civil manner than the phrase "civil authorities" denotes officials who are always courteous, or than a "civil war" implies a nonviolent conflict.'<sup>78</sup>

Remember that Rawls does not treat civil disobedience as peaceful unless the agent is willing to accept the legal consequences of his or her action. For Rawls, fidelity to law demonstrates adherence to shared liberal values. Although my revised definition does not require the actor to welcome the prospect of arrest and punishment, I recognise that he or she might only secure political power by doing so. Acceptance of the legal outcome might create valuable publicity. As Cohen states: 'Arrest and trial and conviction all are likely to catch the public eye, especially if the protester be one of respected position in the community.'<sup>79</sup> Moreover, the community over which the actor wants power might be impressed by his or her readiness to suffer.<sup>80</sup>

Finally, Rawls says that civil disobedience is usually about changing the law or policies of the government. According to my revised account, he is correct to regard this purpose as merely normal. Since the new definition does

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<sup>77</sup> See H.A. Bedau 'On Civil Disobedience' 656.

<sup>78</sup> R.T. Hall *The Morality of Civil Disobedience* 27. Cf. C. Cohen *Civil Disobedience: Conscience, Tactics, and the Law* 7-8.

<sup>79</sup> C. Cohen *Civil Disobedience: Conscience, Tactics, and the Law* 87.

<sup>80</sup> See C. Cohen *Civil Disobedience: Conscience, Tactics, and the Law* 88-89.

not specify the association of people whose behaviour the actor wants the capacity to determine, it encompasses a knowingly unlawful attempt to have power over a group other than a nation. The Greenpeace activists, for instance, no doubt wanted the ability to change the conduct of the manufacturers of genetically-modified seeds as well as the policy of the British government. Rawls is wrong, though, to deny that revolution can be the objective of civil disobedience. My open-ended conception of politics is consistent with such an aim. As Paul Harris states: 'There seems to be no good reason why a person bent on the overthrow of a regime should not be able to perform an *act* of civil disobedience in the service of that aim [...].'<sup>81</sup> On my view, a person whose goal is the abolition of the existing constitution might commit civil disobedience.

By obtaining the definition of civil disobedience from my pure interpretation of political practice, I deny that it is 'a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.'<sup>82</sup> Instead, I describe it as an intentional violation of a legal obligation that is motivated by a desire for power over a community. It might be – even if it is probably not –

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<sup>81</sup> P. Harris 'Introduction: The Nature and Moral Justification of Civil Disobedience' 13. See also H.A. Bedau 'On Civil Disobedience' 659; R. Martin 'Civil Disobedience' 80 *Ethics* (1970) 123, at 125; J. Raz *The Authority of Law: Essays on Law and Morality* 264.

<sup>82</sup> J. Rawls *A Theory of Justice* 320.

secret, violent, immoral and revolutionary. Moreover, it is almost certainly committed by the Greenpeace activists and the anti-war campaigners. Although they obviously sought political power, I cannot be sure – given their subsequent legal arguments – that they meant to act unlawfully. On the (not unrealistic) assumption that they did, however, then their conduct is properly classified as civil disobedience in the revised sense.

As with my account of politics, I believe that my theory of civil disobedience is clearer and more comprehensive than the Rawlsian alternative. Since his liberal version – recall my observations at the end of the first section – distorts both everyday beliefs and questions of morality to an extent that my pure account does not, I conclude that a person engages in civil obedience only when he or she consciously violates a primary norm due to a wish for political power.

### **III**

Having examined the concept (and proposed a conception) of civil disobedience, I now consider its morality. My brief discussion relies on the pure interpretation of moral practice – value-pluralism – that I expound in chapters three and four. Hence, moral appraisal of civil disobedience is contingent on the



proper application of the values – many of which have intrinsic worth – that provide reasons for obedience and disobedience to the law. Each of these reasons is either content-dependent or content-independent. Whereas a reason of the former variety relates to the conduct whose performance the law demands (or – in cases of indirect civil disobedience – the substance of the desired consequence), a reason of the latter type is concerned with the mere existence of the law or the nature of its source.

Whenever the ideals that supply these reasons clash and no 'trade-off' between them is possible – whenever they warrant both obedience and disobedience to the law – then one or more of them must be 'sacrificed'.<sup>83</sup> In the political context of civil disobedience, this dilemma occurs as the 'Machiavellian' problem of 'dirty hands'.<sup>84</sup> When it arises, the actor must decide whether to violate a primary rule with which one moral principle justifies compliance in an attempt to realise an outcome – such as the repeal of unjust legislation – that another moral principle requires. To secure the political power on which the result apparently depends, he or she must employ immoral means and so cannot keep his or her hands clean.

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<sup>83</sup> On the metaphors of 'trade-off' and 'sacrifice', see S. Lukes *Liberals & Cannibals: The Implications of Diversity* (London: Verso, 2003) 66-67.

<sup>84</sup> See N. Machiavelli *The Prince* 48. For discussion, see Q. Skinner *Machiavelli* 37-40; M. Walzer 'Political Action: The Problem of Dirty Hands' 2 *Philosophy and Public Affairs* (1973) 16.



Whether the actor responds appropriately to this conflict between incommensurable ideals is a matter of judgment in the particular circumstances. The proper solution to every moral problem hinges on close examination of the precise context in which it takes place. Given this need for attention to the concrete situation – which often includes previous events in the actor's own life<sup>85</sup> – then I am unable to reach any definite conclusions about the morality of civil disobedience here.<sup>86</sup> I might, however, indicate some sorts of facts that are likely – I cannot suppose that any is certain – to be relevant to the judgment on which moral evaluation of a response to the law of this kind depends.

The specific way in which the actor pursues political power is liable to have an impact on the application of morality to his or her act of civil disobedience. Whether he or she employs violent means, for example, is almost sure to affect moral evaluation of his or her behaviour. Indeed, many theorists claim that a violent breach of the law is always immoral.<sup>87</sup> They infer a moral conclusion from the fact of violence alone. But the immorality of violent disobedience cannot be assumed. As Harris states: 'The possibility that a

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<sup>85</sup> See C. Taylor 'Leading a Life' in R. Chang (ed.) *Incommensurability, Incompatibility and Practical Reason* (Cambridge, Mass.: Harvard University Press, 1997).

<sup>86</sup> Compare C. Cohen *Civil Disobedience: Conscience, Tactics, and the Law* 93.

<sup>87</sup> See, for example, M. Bayles 'The Justifiability of Civil Disobedience' 17; S.M. Brown 'Civil Disobedience' 678; A. Fortas *Concerning Dissent and Civil Disobedience* 80; S. Hook 'Social Protest and Civil Disobedience' 58.

violence charge against an act of civil disobedience might be overridden has to be recognized, even though we might think that the circumstances in which this could happen would be rare and difficult to imagine.<sup>88</sup>

The character (and not merely the fact) of the violence is also potentially relevant to whether it can be morally justified. As s. 420 of the Crimes Act 1900 (NSW) – which qualifies the defence on which Dave Burgess and Will Saunders sought to rely at their trial – illustrates, violence to persons is generally distinguished from violence to property.<sup>89</sup> Both the particular target – the identity of the person or persons at whom or the property at which the actor directs his or her conduct – and the actual degree of the violence are liable to have a bearing on moral evaluation of it.

To determine the proper application of moral norms to an instance of civil disobedience, however, consideration of the precise way in which and the specific purpose for which the actor tries to secure political power is unlikely to be sufficient.<sup>90</sup> Examination of the potential success of his or her action is almost

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<sup>88</sup> P. Harris 'Introduction: The Nature and Moral Justification of Civil Disobedience' 33. See also J. Raz *The Authority of Law: Essays on Law and Morality* 267; H. Zinn 'A Fallacy on Law and Order: That Civil Disobedience Must be Absolutely Nonviolent' 107.

<sup>89</sup> See R. Audi 'On the Meaning and Justification of Violence' in J.A. Shaffer (ed.) *Violence: Award-Winning Essays in the Council for Philosophical Studies Competition* (New York: David McKay, 1971) 98-99.

<sup>90</sup> I assume here that the actor does not seek political power for its own sake.

certain to have an effect too.<sup>91</sup> Whether a particular method is liable to succeed depends on the beliefs of the people over whom the actor desires power. If they have an aversion to violence, then a violent breach of the law is unlikely to be effective. If, moreover, they are unable in cases of civil disobedience that is indirect to perceive any connection between the legal norm that the actor infringes and the goal to which he or she aspires – the link is obvious when civil disobedience is direct – then failure seems inevitable.<sup>92</sup>

I also expect the correct application of morality to an act of civil disobedience to be influenced by the availability or otherwise of alternative means that are no less likely than those that the actor employs to generate the desired outcome.<sup>93</sup> Yet this is not to say – as many theorists do<sup>94</sup> – that civil disobedience cannot be morally justified if the actor is able to pursue his or her

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<sup>91</sup> See M. Bayles 'The Justifiability of Civil Disobedience' 18; P. Harris 'Introduction: The Nature and Moral Justification of Civil Disobedience' 31.

<sup>92</sup> See M. Bayles 'The Justifiability of Civil Disobedience' 18; C. Cohen *Civil Disobedience: Conscience, Tactics, and the Law* 480-481; K. Greenawalt *Conflicts of Law and Morality* (Oxford: Oxford University Press, 1987) 235-236; R.T. Hall *The Morality of Civil Disobedience* 97; P. Harris 'Introduction: The Nature and Moral Justification of Civil Disobedience' 28; S. Hook 'Social Protest and Civil Disobedience' 59.

<sup>93</sup> According to Will Saunders, none was available to him: 'I did what I felt I had to do.' See 

Sydney	Opera	House:	NO	WAR
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 <<http://www.sydneyoperahousenowarcleanupfund.org/quotes.html>>.

<sup>94</sup> For discussion, see M. Bayles 'The Justifiability of Civil Disobedience' 12; C. Cohen 'Defending Civil Disobedience' 482; A. Fortas *Concerning Dissent and Civil Disobedience* 80; P. Harris 'Introduction: The Nature and Moral Justification of Civil Disobedience' 31; S. Hook 'Social Protest and Civil Disobedience' 58; J. Rawls *A Theory of Justice* 327-328; J. Rawls 'The Justification of Civil Disobedience' 183; P. Singer *Democracy and Disobedience* (Oxford: Clarendon Press, 1973) 84.

objective in a lawful manner. Legality is no guarantee of an equal or superior chance of success.

Finally, the willingness of the actor to be penalised for his or her breach of a legal obligation is likely to make an impression on whether an instance of civil disobedience is morally justified.<sup>95</sup> Although subsequent acceptance of punishment cannot have a *direct* effect on the morality of an action,<sup>96</sup> the actor's readiness to suffer might impress the group over whom he or she wishes to have power and thereby increase the probability of the outcome that he or she seeks. By doing so, it may *indirectly* affect moral evaluation of his or her conduct.

These, then, are some of the facts that are likely to (or, at least, might) be relevant to the judgment on which the morality of a particular act of civil disobedience depends. Although my list is inevitably partial, I hope that it nevertheless indicates several considerations that are liable to have an impact on the proper application of morality to civil disobedience. I hope, therefore, that it enhances the analysis of moral practice that I advance in chapters three and four. I hope, too, that it helps to demonstrate the superiority of the philosophical

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<sup>95</sup> See M. Bayles 'The Justifiability of Civil Disobedience' 20; S.M. Brown 'Civil Disobedience' 676; A. Fortas *Concerning Dissent and Civil Disobedience* 125; S. Hook 'Social Protest and Civil Disobedience' 59; K. Greenawalt *Conflicts of Law and Morality* 239.

<sup>96</sup> See L.J. Macfarlane 'Justifying Political Disobedience' 36; E. Van Den Haag *Political Violence and Civil Disobedience* 32-33.

approach on which I rely in those chapters and, indeed, throughout the present work.

I defend the possibility of this methodology in the first chapter by denying the need for a philosopher to engage in moralistic interpretation of conduct that he or she wishes to describe. In an attempt to vindicate my commitment to this mode of comprehension, I then offer pure interpretations of various forms of obedience and disobedience to the law. I start by examining obedience that results from a belief in the law's authority and suggest an alternative to Joseph Raz's moralistic account of such behaviour. Next, I articulate a theory of moral practice – namely, value-pluralism – that ascribes intrinsic worth to many – and not merely one or a few – of the ideals that participants cite in support of their obedience and disobedience to the law. I contrast my reading of these values with Ronald Dworkin's moralistic interpretation of them. Finally, I propose the replacement of the liberal conception of politics in terms of which John Rawls defines civil disobedience with an understanding of political action that emphasises conflict and power. By subjecting these forms of behaviour to pure analysis, I aim to improve comprehension of them. But that is not my sole objective: I also want to show that a philosopher ought to rely exclusively on meta-theoretical norms when

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trying to make sense of human conduct. My ambitions are, therefore, methodological as well as substantive. I hope to realise them both.



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